Supreme Court, U.S.
FILED
971666 APR 10 1998
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1997

KEVIN E. BRYAN and RENEE M. BRYAN

Petitioners,

vs.

KENNETH M. CLAYTON and
NEAL McCULLOH, individually and d/b/a
CLAYTON & McCULLOH, a Florida general partnership

On Petition For Writ Of Certiorari To The
State Of Florida Fifth District Court Of Appeal

PETITION FOR WRIT OF CERTIORARI

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113 pp

QUESTION PRESENTED

Are third party collection agents exempt from having to comply with the federal Fair Debt Collection Practices Act ("FDCPA") prohibitions against overreaching, intimidation, misrepresentation, etc. when they are attempting to collect condominium and homeowner association dues and assessments and ancillary charges, or are such items "debts" under the FDCPA?

PARTIES TO THE PROCEEDINGS

Respondents, Kenneth M. Clayton and Neal McCulloh, individually and doing business as Clayton & McCulloh, a Florida general partnership (hereafter, collectively, "the law firm" or "Clayton"), were the appellees in the appellate proceedings below. Kevin E. Bryan and Renee M. Bryan, his wife (hereafter, "the homeowners" or "the Bryans"), were the appellants. Amber Ridge Homeowner's Association, Inc. (hereafter "Amber Ridge") was a defendant in the trial court, but the claims against Amber Ridge were not involved in the appellate proceedings below. Accordingly, Amber Ridge did not participate in the appellate proceedings below, nor is it a participant herein.

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PETITION FOR WRIT OF CERTIORARI

Kevin E. Bryan and Renee M. Bryan, his wife, respectfully petition for a writ of certiorari to review the judgment of the State of Florida Fifth District Court of Appeal in this case.

OPINIONS BELOW

The trial court's order of May 7, 1996 [APX. 7] granting summary judgment to the law firm, and its final judgment filed July 29, 1996 in favor of the law firm [APX. 14], are unreported. The Florida Fifth District Court of Appeal opinion of May 9, 1997 affirming the trial court [APX. 1], and its opinion of September 12, 1997 denying a stay of its mandate [APX. 3], are reported at 698 So.2d 1236. Its order of May 12, 1997 provisionally awarding attorney's fees to the law firm, and its findings of fact in connection therewith [APX. 5], are unreported, as is its order of June 25, 1997 denying the homeowners' motion for clarification, rehearing, rehearing *en banc*, certification, and for ancillary relief [APX. 17]. Similarly, the Florida Supreme Court's order of January 28, 1998 denying the homeowners' petition for discretionary review and granting the law firm's motion for attorney's fees [APX. 18] is unreported.

JURISDICTIC

As noted above, the Florida Fifth District Court of Appeal affirmed the trial court on May 9, 1997 [APX. 1]

and thereafter denied the homeowners' motion for clarification, rehearing, rehearing *en banc*, certification, and for ancillary relief on June 25, 1997 [APX. 17]. Before the mandate issued, however, the United States Seventh Circuit Court of Appeals issued a squarely contrary opinion in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F. 3d 477 (7th Cir. 1997) on July 2, 1997 [APX. 64], whereupon the homeowners timely moved to stay or recall the mandate by reason thereof. Ultimately, this motion was denied in a reported opinion entered on September 12, 1997 [APX. 3], in which the court expressly disagreed with and declined to follow *Newman*. The homeowners timely petitioned the Florida Supreme Court to invoke its discretionary jurisdiction for review thereof, but the petition was denied by order dated January 28, 1998 [APX. 18]. The instant petition for writ of certiorari has been timely filed within 90 days thereafter. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The stated purpose of the FDCPA is :

> [T]o eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e). [APX. 56] The homeowners' complaint alleged multiple violations of the FDCPA, namely, 15 U.S.C. §§ 1692e(2),(5),(10) [APX. 58]; 1692f(1) [APX.

59]; and 1692g(a),(b). [APX. 60] Additional pertinent statutory provisions included in the appendix at APX. 56 *et seq.* are 15 U.S.C. §§ 1692; 1692a(1)-(5); 1692a6(F) as relevant to this petition; 11 U.S.C. § 101(8); and 15 U.S.C. §§ 1601(a); 1602(a), (d)-(f), (h). The statutory provisions most relevant to this petition are the following definitions:

> As used in [the FDCPA] –
>
> . . .
>
> (3) The term 'consumer' means ***any*** natural person obligated or allegedly obligated to pay ***any*** debt.
>
> (4) The term 'creditor' means ***any*** person who offers or extends credit creating a debt ***or*** to whom a debt is owed. . . . .
>
> (5) The term 'debt' means ***any*** obligation or alleged obligation of a consumer to pay money arising out of a ***transaction*** in which the money, property, insurance, or services which are the subject of the transaction are primarily for ***personal, family, or household purposes***, whether or not such obligation has been reduced to judgment. [emphasis added.]

15 U.S.C. § 1692a(3),(4),(5). [APX. 57] Similarly, the Bankruptcy Code, 11 U.S.C. § 101(8), provides that for purposes of the Bankruptcy Code, " 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose[.]" [APX. 61] The Truth-In-Lending Act defines "consumer" somewhat more narrowly, as follows:

> [h] The adjective 'consumer', ***used with reference to a credit transaction***, characterizes the transaction as one in which the party ***to whom credit is offered or extended*** is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family or household purposes. [emphasis added].

15 U.S.C. § 1602(h). [APX. 62]

Finally, under 15 U.S.C. § 1692i(a)(1), the FDCPA regulates not only debt collection efforts directed against personal property, but also debt collection efforts directed against real property.

> Any debt collector who brings any legal action on a debt against any consumer shall –
>
> (1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located[.]

Id.

STATEMENT OF THE CASE

As reflected below, the homeowners' right to a cause of action under the federal statute was asserted *ab initio* and has been asserted continuously throughout these proceedings.

In August 1995, the homeowners sued the law firm in state court, asserting in the complaint fifteen separate violations of the FDCPA by the law firm in its attempts to

collect homeowner association dues and ancillary charges, such as attorney's fees, in connection therewith from the homeowners. The complaint and exhibits thereto are reproduced in the appendix beginning at APX. 20; the FDCPA is invoked therein at APX. 22, ¶ 13; the operative facts discussed below are all set forth in the complaint or the exhibits thereto; the specific violations of the FDCPA resulting from those facts, together with the citations to the specific statutory sections contended to have been violated, are set forth in ¶¶ 57(a)-(o) of the complaint, beginning at APX. 29; and the exhibits to the complaint begin at APX. 38.

As elaborated upon in the complaint, the law firm: in a December 1, 1994 demand letter, gave the homeowners fourteen days to pay the sum of $505.07 by cashier's check; threatened a lien and foreclosure if not timely paid; furnished the homeowners the FDCPA notice of their right to dispute and seek verification of the alleged debt [APX. 41, Exhibit A to complaint]; caused the homeowners thereby to promptly send a cashier's check for the $505.07, together with a written request for an itemization of how the amount was derived [APX. 42, Exhibit B to complaint]; returned the homeowners' check some 49 days later, claiming, without specificity, that the homeowners had failed to comply with their December 1 demand letter, and further claiming that some larger, unspecified, changing daily amount was now owed [APX. 43, Exhibit C to complaint]; responded in a February 2, 1995 telephone inquiry that the new balance owed was now $991.54, the increase from $505.07 being primarily attributable to purported additional attorney's fees [APX. 26, complaint ¶ 40]; never furnished a verification of debt

until a statement dated March 3, 1995 [APX. 49, Exhibit E to complaint] – which contended the balance due had risen to $1,196.56 as of February 4, 1995, including "$836.26 for cost, collection charges and attorney's fees" *Id.*; and claimed by a separate letter, also dated March 3, 1995, that $1,199.80 would be the total due as of March 16, 1995 – including a "lien charge" of $125, a "wind-up charge" of $155, attorney's fees of $556.26, and interest through February 1995. [APX. 51, Exhibit F to complaint] (The sum of $125 + $155 + $556.26 equals the $836.26 mentioned in the above-referenced March 3 verification of debt statement.)

These charges and fees were demanded even though: (a) the homeowners had tendered full payment as demanded back on December 8, 1994; (b) no lien had been recorded as of March 3, 1995, nor ever was until June 21, 1995 [APX. 53, Exhibit G to complaint]; and (c) the homeowners had still never been furnished an explanation of how the initial $505.07 demand was derived, much less any explanation of why it had escalated to $1,199.80 since they had timely done exactly as they were told. [APX. 25, Complaint ¶¶ 32, 33, 39-42, 48, 51] Even when the complaint was filed on or about August 8, 1995, some eight months after the original demand letter for the $505.07, the law firm had still never furnished the homeowners a verification of debt statement explaining how the $505.07 originally demanded had been determined. [APX. 31, Complaint ¶ 57(o)]

Even though the law firm had furnished the homeowners with the FDCPA notice as an attachment to the law firm's original December 1, 1994 demand letter [APX.

40, final paragraph, and APX. 41-42, Exhibit A to complaint], the law firm ultimately asserted to the trial court that based upon a series of rulings by various federal district courts in New Jersey, Illinois, Florida, and Virginia, the FDCPA does not apply to independent collection agents' attempts to collect dues and assessments for homeowner associations and condominium associations (hereafter, collectively "community associations"). The trial court agreed with the law firm [APX. 7], as did the Florida Fifth District Court of Appeal [APX. 1] – even after the first federal circuit court opinion squarely on point (*Newman, infra* [APX. 64]), held to the contrary.

REASONS FOR GRANTING THE PETITION

I. Review Is Necessary Because A Florida State Court Of Last Resort Has Decided A Federal Question In A Way That Expressly Conflicts With A Decision Of The United States Seventh Circuit Court Of Appeals, Namely, *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997).

The reason this Court should accept jurisdiction and grant this petition was best expressed, succinctly, in the most recent of the roughly half-dozen federal district court cases to expressly rule on the question presented herein, *Thies v. Wyman*, 969 F. Supp. 604 (S.D. Cal. 1997):

> There is considerable confusion and conflict in the federal courts as to what a 'transaction' is for the purposes of this statute.

Thies, 969 F. Supp. at 606. [APX. 74 at 77]. *Thies* chose to follow *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d

477 (7th Cir. 1997), which held, essentially, that in determining the scope (and limits) of the FDCPA, the words "any", "debt", and "transaction" in the FDCPA definitions should be given their plain and ordinary meanings.

In so holding, *Newman* joined two other recent panel decisions from the seventh circuit, *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir. 1997) and *Ryan v. Wexler & Wexler*, 113 F.3d 91, 93 (7th Cir. 1997), *cert. denied*, ___ U.S. ___, 118 S.Ct. 298, 139 L.Ed.2d 229 (1997), which had rejected the *dictum* or alternative holding in *Zimmerman v. HBO Affiliates Group*, 834 F.2d 1163 (3d Cir. 1987) (involving collection efforts for damages for theft of HBO signals), that as a subchapter of the Consumer Credit Protection Act, the FDCPA implicitly required "transactions" to have arisen from an extension of credit in order to be regulated under the FDCPA. Prior to this trilogy of seventh circuit decisions, this proposition of *Zimmerman* appeared to enjoy unchallenged acceptance among the nation's judiciary. Subsequently, however, the ninth and eleventh circuits have followed the seventh circuit trilogy and rejected *Zimmerman* to the extent it purports to stand for any more than the proposition that torts (*e.g.*, theft) are not "transactions". *See Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739 (9th Cir. 1997), *cert. denied sub. nom., Checkrite Ltd. v. Charles*, ___ U.S. ___,118 S.Ct. 627, 139 L.Ed.2d 607 (1997) and *Brown v. Budget Rent-A-Car Systems, Inc.*, 119 F.3d 922 (11th Cir. 1997). On the other hand, neither *Charles* nor *Brown* (nor *Zimmerman*) involves a community association.

To date, *Newman* is the first federal appellate court (and only the second appellate court anywhere, *Bryan*

being the first) to expressly construe the FDCPA in the context of dues and assessments for community associations. Prior to *Newman*, the federal district courts were ruling uniformly in favor of the collection agents for the community associations, and against the individual owners. They did so on one or more of the following bases: (a) they adopted the *Zimmerman* "extension of credit" rationale, coupled with the assumption that association dues are generally paid in advance, not in arrears[1]; or (b) they perceived community associations to be analogous to mini-governments, hence, dues and assessments to be analogous to taxes; and therefore, citing the Third Circuit Court of Appeal decision in *Staub v. Harris*, 626 F.2d 275 (3d Cir. 1980) (per capita taxes for prisons, roads, defense, etc., are not "debts" under the FDCPA), they concluded that community association dues are also in a different league than FDCPA "debts"[2]; or (c), in the case of *Nance v. Petty, Livingston, Dawson, & Devening*, 881 F. Supp. 223 (W.D. Va. 1994), cited with

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[1] *See Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla.), *aff'd without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*,___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D. Ill. July 21, 1995); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991).

[2] *See Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla.), *aff'd without opinion*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*,___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D. Ill. July 21, 1995); *contra, Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991).

approval in *Bryan*, the court inexplicably relied on *Mabe v. G.C. Services, Ltd.*, 32 F.3d 86, 88 (4th Cir. 1994) (past due child support is not a "debt" under the FDCPA) to conclude that an assessment to repair a private road to one's subdivision is not a "debt" under the FDCPA.

After rejecting *Zimmerman*, the *Newman* court attacked the mini-government analysis in *Staub*:

> We have concluded that the relevant transactions in these cases were the purchase of the family homes, and on that general level, there can be little doubt that the subject of those transactions had a personal, family, or household purpose. More specifically, however, we also believe that the assessments themselves satisfy that statutory requirement. . . . In our view, when a special assessment is used to repair a common roof[,] the assessments are for a household purpose even if more than a single household benefits. [T]he assessments here have a more specific household purpose than taxes collected by a governmental entity. Rather than generally providing for government services, these assessments are collected in order to improve and maintain commonly-owned areas used by each unit owner. The assessments thereby directly benefit each household in the development. As a result, the assessments have a "personal, family, or household purpose". *See Archer, [supra]* (rejecting argument that condominium assessments can be likened to local taxes).

Newman at 481-82, *rev'g. sub. nom. Riter, supra.*

Notwithstanding *Newman's* cogent analysis, the Florida court in *Bryan* remained loyal to the prior federal

district court cases and expressed disagreement with *Newman's* assertion that community association members have the right to be protected by the FDCPA. The court wrote:

> We have concluded, contrary to the *Newman* panel, that the purchase of a condominium unit is not a "consumer transaction" and we are dubious that the question whether an association assessment is a "consumer debt" subject to the Fair Debt Collection Practices Act turns on whether the unit was originally purchased for "personal, family or household" purposes.

Bryan v. Clayton, 698 So.2d 1236 (Fla. 5th DCA 1997). [APX. 1 at 3]

Yet, there can be no doubt that: the FDCPA itself does not, in words, limit the types of "personal, family or household" transactions to be protected beyond the broad phrase "money, property, insurance, or services" [*see* 15 U.S.C. § 1692a(5)]. [APX. 57] Moreover, the conduct complained of herein is the very type of conduct the FDCPA was intended to prohibit, and Congress expressly repealed the exemption for attorneys in the 1986 amendments because of recurring abuses by our profession in the collection of consumer debts. *See, e.g.*, discussion in *Heintz v. Jenkins*, 514 U.S. 291 (1995). Indeed, the instant litigation arose because the homeowners had the temerity (and, we contend, the right) to do exactly as they had been told to do by the law firm – only to be figuratively told by the law firm later, "we were only kidding".

Thus, the point of departure between *Newman* and *Bryan* is whether the FDCPA expressly or by necessary implication carved out an exemption for such misdeeds

when they are conducted in the course of collecting community association dues and assessments and ancillary charges thereto – such as attorney's fees, interest, "lien fees", "wind-up fees", etc.

As indicated in its opinion above, the Florida appellate court in *Bryan* claims to have found such an exemption. However, its opinion fails to articulate how, where and why it reached such result. It professes to be "dubious" of the conclusions reached in *Newman*, but offers no explanation as to the basis for its doubt. Yet, this federal issue is too significant to be so summarily addressed. It has implications far beyond the immediate parties to this cause. The issue stands to affect as many as forty-two million community association residents, and they deserve better than to be left in a sea of uncertainty and grave risk over their relative rights and obligations pertaining to what is probably their most important financial investment.

According to the Internet "Web Site" of the Community Associations Institute (hereafter "CAI"), which organization filed an *amicus curiae* brief on behalf of the community associations in *Newman*, [*see* APX. 64] and which proclaims itself as:

> [T]he nation's voice for condominium, cooperative and homeowners associations. The Institute is a national, non-profit 501(c)(6) association created in 1973 to educate and represent America's residential community associations . . . and related professionals and service providers. . . . CAI has more than 16,000 members in 58 chapters . . . and [a] 42-person staff.

http://www.caionline.org/gettinganswers/whatiscai/index.htm, CAI estimated the national impact of community associations in March, 1998 as follows:

Number of persons living in community associations	42 million
Number of community associations	205,000
Number of community association living units	16.4 million
Estimated resale value of all community association units	$1.7 trillion

http://www.caionline.org/mediacenter/facts/fact2.htm

Even the Internal Revenue Service recognizes the impact of community associations, having designed a special income tax return, IRS form 1120-H, for such organizations. Moreover, the homeowners submit that the issue *sub judice* is likely to be exacerbated the longer it is ignored, because according to CAI: "With more than 50% of new development in large metropolitan areas using a community association format, CAI forecasts continued growth of 6,000 to 8,000 additional community associations each year". *Id.*

Indeed, the *Bryan* court itself acknowledged the significance of this case in its order provisionally granting the law firm attorney's fees:

> The question of law at issue was well presented on appeal and would be considered 'close.'
>
> The suite [sic] was in the nature of a test case presenting questions of far-reaching importance in Florida affecting non-parties who are charged with collecting condominium assessments or are obligated to pay them.

Bryan v. Clayton, No. 96-2406 (Fla. 5th DCA May 12, 1997). [APX. 5]

Thus, society needs this Court to take jurisdiction – now – because a refusal to do so would have a chilling effect upon these ever-increasing millions of community association residents. A declination of jurisdiction would encourage the continuation and expansion by third party independent collection agents of unfair, deceptive, and overreaching collection efforts, with the knowledge that the relatively minor amount involved per collection, and the absence of the potential club of attorney's fees for a successful residential litigant, will result in the ability of the independent collection agent to pummel most community association residents into passive submission, or into *pro se* representation if they do litigate. Nothing could be more repugnant to the goals and aspirations of the FDCPA.

Moreover, a refusal to accept jurisdiction would send a negative, albeit unintended, message that the respondent law firm is being rewarded for its own misconduct. Thus, the homeowners respectfully urge that they and their 42 million fellow community association residents deserve to be, and need to be, informed – now – as to whether, under the FDCPA, they are entitled to the same protection where they live as where they shop.

II. A Florida State Court Of Last Resort Has Decided An Important Question Of Federal Law Which Has Not Been, But Should Be, Expressly And Squarely Settled By This Court, And, *A Fortiori*, Because The State Court Decision Appears To Conflict, At Least in Philosophy, With This Court's Decision In *Heintz v. Jenkins*, 514 U.S. 291 (1995)

In *Bryan*, the Florida Fifth District Court of Appeal has declined the homeowners' plea that the court follow the "plain language" of the FDCPA, contrary to what this Court did (albeit in examining a different aspect of the FDCPA) in *Heintz v. Jenkins*, 514 U.S. 291 (1995). Specifically, although this Court, in *Heintz*, was focusing on the issue of whether the FDCPA contained an implicit exemption for litigating attorneys as opposed to community association attorneys, the approach of this Court in *Heintz* is instructive – and diametrically opposite the approach taken in the lower court herein. In a unanimous opinion, Justice Breyer analyzed the issue and the FDCPA: by examining the conduct "[i]n ordinary English"; 514 U.S. at 294; by referring to "the statute's apparent objective;" 514 U.S. at 296; by scrutinizing the alleged exemption from being subject to regulation by the FDCPA in the face of "the plain language of the Act itself"; 514 U.S. at 297; and by contemplating "the range of reasonable interpretations of the Act's express language". 514 U.S. at 298.

In contrast and apparent contradiction to the above methodology (and conclusions), the state appellate court herein has written instead:

> Appellants urge that we should simply adopt the 'plain meaning' of the 'crystal clear' language of the Act [footnote omitted] to determine

> that a homeowner's maintenance assessment is a debt. This we cannot do because the statute has no plain meaning and its intent is anything but crystal clear. It appears that the federal courts that have addressed the question of the application of this legislation to homeowner's and condominium maintenance assessments have concluded that this legislation does not embrace assessments of property owners for the mutual maintenance of the commonly held areas of the community. *Riter v. Moss & Bloomberg, Ltd.*, 932 F. Supp. 210 (N.D. Ill. 1996); *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla.), *aff'd*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*,___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D. Ill. July 21, 1995); *Nance v. Petty, Livingston, Dawson & Devening*, 881 F. Supp. 223 (W.D. Va. 1994); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991). We agree that such assessments are not consumer "debts" within the purview of this legislation.

698 So.2d 1236. [APX. 1-2] Even when *Newman* reversed the *Bryan* court's first-cited case above, *Riter*, and shattered the other precedents *Bryan* relied upon, the Florida state appellate court declined to change its conclusions on the clarity or opaqueness of the FDCPA and on the non-applicability thereof to community association dues. In denying the homeowners' motion to stay or recall the mandate, the court wrote:

> As is apparent from the recent decision of the United States Court of Appeals for the Seventh Circuit, *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), the issue presented is a difficult one. The federal courts are

> groping for a principled, logical and consistent interpretation of a statute that is poorly drafted and whose true scope appears hopelessly lost in its circular definitional scheme.
>
> After our review of the *Newman* decision, we decline to recall [3] our mandate and reconsider our prior affirmance. Although part of the text of our opinion might have been different had this court had the benefit of the decision of the learned panel of the federal appeals court, our decision to affirm would not have been different. Rejection of the 'extension of credit' analysis of *Zimmerman v. HBO Affiliates Group*, 834 F.2d 1163 (3d Cir. 1987) does not dictate the conclusion that the assessment of the owner of a condominium unit for his pro rata share of the costs of maintenance of the common elements and other common costs of condominium unit ownership is a 'consumer' 'debt.'

Bryan, 698 So.2d at 1236. Yet, as seen in the homeowners' first argument above, *Newman* [APX. 64] offers a well-reasoned and thought-provoking analysis, from the same circuit court of appeals that correctly analyzed *Heintz*, and in a manner consistent with *Heintz*, in concluding that community association dues and assessments are "consumer" "debts" under the FDCPA. Jurisdiction should be taken in order that *Heintz* can be reaffirmed, *Bryan* can be repudiated, *Newman* can be declared to be the law of the land, and our citizens can be removed from undue and unfair risk.

---

[3] [*sic* – should read "stay" – the mandate had not yet issued]

CONCLUSION

Between the Florida state court's direct conflict with *Newman*, its seeming philosophical conflict with this Court's decision in *Heintz*, the large number of community associations nationwide, Florida's status as the fourth largest state in population (and probably the second or third largest in community associations), and the grave potential for financial abuse of community association residents if the issue is not addressed and the uncertainty resolved, the issue presented is ripe for determination now. This petition for writ of certiorari should be granted.

Respectfully submitted,

KENNETH L. MANN
Counsel of Record
KENNETH L. MANN, P.A.
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APPENDIX

[698 So.2d 1236]

Kevin E. BRYAN and Renee M. Bryan,

Appellants,

v.

Kenneth M. CLAYTON, et al., Appellees.

No. 96-2406.

District Court of Appeal of Florida,
Fifth District.

May 9, 1997.
Order Denying Stay Sept. 12, 1997.

Kenneth L. Mann and Stephen H. Price of Trickel, Leigh & Mann, P.A., Orlando, for Appellants.

Kenneth M. Clayton and James E. Olsen of Clayton & McCulloh, Orlando, for Appellees.

PER CURIAM.

In this appeal we are asked to decide whether maintenance assessments owed to the appellants' homeowners' association are "debts" for purposes of the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act. We conclude that they are not and affirm the decision below.

Appellants urge that we should simply adopt the "plain meaning" of the "crystal clear" language of the act[1] to determine that a homeowners' maintenance

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[1] Debt is defined in 15 U.S.C. § 1692a(5) as follows:

The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the

assessment is a debt. This we cannot do because the statute has no plain meaning and its intent is anything but crystal clear. It appears that the federal courts that have addressed the question of the application of this legislation to homeowner's and condominium maintenance assessments have concluded that this legislation does not embrace assessments of property owners for the mutual maintenance of the commonly held areas of the community. *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D.Ill.1996); *Azar v. Hayter*, 874 F.Supp. 1314 (N.D.Fla.), *affirmed*, 66 F.3d 342 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Vosatka v. Wolin-Levin, Inc.*, No. 94-C-4129, 1995 WL 443950 (N.D.Ill. July 21, 1995); *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223 (W.D.Va.1994); *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. Mar. 5, 1991). We agree that such assessments are not consumer "debts" within the purview of this legislation.

AFFIRMED.

COBB, W. SHARP and GRIFFIN, JJ., concur.

---

money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

The act also defines "consumer" in the following manner:

The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

15 U.S.C. § 1692a(3).

ON MOTION TO STAY OR RECALL MANDATE

PER CURIAM.

Appellants have vigorously and effectively prosecuted their appeal of the decision of the lower tribunal denying them a cause of action under the federal and state fair debt collection practices acts. As is apparent from the recent decision of the United States Court of Appeals for the Seventh Circuit, *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir.1997), the issue presented is a difficult one. The federal courts are groping for a principled, logical and consistent interpretation of a statute that is poorly drafted and whose true scope appears hopelessly lost in its circular definitional scheme.

After our review of the *Newman* decision, we decline to recall [sic] our mandate and reconsider our prior affirmance. Although part of the text of our opinion might have been different had this court had the benefit of the decision of the learned panel of the federal appeals court, our decision to affirm would not have been different. Rejection of the "extension of credit" analysis of *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163 (3d Cir.1987) does not dictate the conclusion that the assessment of the owner of a condominium unit for his pro rata share of the costs of maintenance of the common elements and other common costs of condominium unit ownership is a "consumer" "debt." We have concluded, contrary to the *Newman* panel, that the purchase of a condominium unit is not a "consumer" "transaction" and we are dubious that the question whether an association assessment is a "consumer debt" subject to the Fair Debt Collection Practices

Act turns on whether the unit was originally purchased for "personal, family or household" purposes. Appellants' motion to stay or recall mandate is denied.

GRIFFiN, C.J., and COBB and W. SHARP, JJ., concur.

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

KEVIN E. BRYAN and
RENEE M. BRYAN,

Appellant,

v.

CASE NO. 96-2406

KENNETH M. CLAYTON,
et al.,

Appellee.

_____/

DATE: May 12, 1997

BY ORDER OF THE COURT:

ORDERED that Appellees' MOTION FOR ATTORNEYS' FEES ON APPEAL, filed February 13, 1997, pursuant to Section 768.79, Florida Statutes (1995), is provisionally granted and the above-styled cause is remanded to the lower court to determine entitlement and amount under the statute. If the lower court reaches the issues in section 768.79(7)(b), Florida Statutes (1995), relevant to the setting of an amount of an award, this Court's evaluation of the statutory factors, 1., 3. and 5., determinable on appeal are that:

> The claim was not apparently meritless;
>
> The question of law at issue was well presented on appeal and would be considered "close."
>
> The suite [sic] was in the nature of a test case presenting questions of far-reaching importance in Florida affecting non-parties who are charged with collecting condominium assessments or are obligated to pay them.

I hereby certify that the foregoing is (a true copy of) the original court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Clerk of the Court, Orange County (CI95-5032)
Kenneth L. Mann, Esq.
Kenneth M. Clayton, Esq.
Randy Hillman, Esq.

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,
Plaintiffs,

vs.

AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., A Florida corporation, and KENNETH M. CLAYTON and NEAL MCCULLOH, individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership,
Defendants.
_____/

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

THIS CAUSE came before the court on the Motion for Summary Judgment and Motion to Dismiss of defendants Kenneth M. Clayton and Neal McCulloh, individually and d/b/a Clayton & McCulloh. The primary issue is whether the complaint states claims against these defendants for which relief may be granted. For the reasons expressed below, this court finds that it does not.

Plaintiffs, Kevin and Renee Bryan ("the Bryans"), filed suit against the defendants concerning the collection of assessments levied against them by their homeowners association, Amber Ridge Homeowners Association, Inc. ("Amber Ridge"). Specifically, the Bryans have sued

Clayton and McCulloh, individually and d/b/a Clayton & McCulloh, the attorneys and law firm allegedly retained to collect the assessments, for violating the Fair Debt Collection Practices Act under 15 U.S.C.A. sec. 1692 ("the federal act") and the Florida Consumer Collection Practices Act, under sections 559.55-559.785, Florida Statutes ("the state act").[1]

The Fair Debt Collection Practice Act prohibits "debt collector[s]" from making false or misleading representations and from engaging in various abusive and unfair practices. *Heintz v. Jenkins*, ___ U.S. ___, 115 S.Ct. 1489, 131 L.Ed. 2d 395 (1995). The state act similarly restricts certain actions in the collection of consumer debts. Sections 559.552, 559.72, Florida Statutes. A "debt collector," generally, is one

> . . . who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.

15 U.S.C. sec. 1692a(6).[2] The U.S. Supreme Court has recently held that an attorney who is regularly engaged in consumer debt-collection litigation on behalf of creditor clients should be considered a "debt collector" under

---

[1] The Bryans have also filed a declaratory judgment action against Amber Ridge in order to have the court determine whether the claim of lien filed against them for these assessments is legally enforceable.

[2] The general Florida definition of "debt collector" is virtually identical.

the federal act. *Heintz*, 115 S.Ct. at 1490. Thus, it is possible that the attorneys involved in the instant case could be regulated by the acts as "debt collectors." Therefore, logically, the threshold issue is whether the collection these attorneys were trying to make was of a "debt" within the definition of the federal and state acts. The instant defendants argue that it was not.

The term "debt," as used in both the federal and state acts, is defined as:

> . . . any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. sec. 1692a(5); sec. 559.55(1), Florida Statutes.

While the issue has not often been considered, courts of other jurisdictions have held that assessments made by homeowners associations are not "debts" within the definition of the federal act. In *Nance v. Petty, Livingston, Dawson, & Devening*, 881 F. Supp. 223 (W.D. Va. 1994), the court dismissed an action under the federal act holding that a special assessment made by the plaintiffs' subdivision for maintaining a private road did not fall within the act because it did not arise out of a transaction which was "primarily for personal, family, or household purchases." Similarly, in a more recent Florida federal case, *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd*, 66 F. 3d 342 (11th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed. 2d 666 (1996), the court found that unspecified fees, which the court assumed were the

assessments by a condominium association to all condominium owners of the costs of maintenance of common areas, were not "debts" falling within the federal act when they did not reflect deferred payments on a prior debt and where there was no evidence of a pro tanto exchange. The court held that the plaintiff's action based on the federal act failed to state a claim upon which relief could be granted. *Id.* at 1321.[3]

The *Nance* and *Azar* courts drew their reasoning from other decisions considering the question of what is a "debt" under the federal act. Specifically, both courts cited *Mabe v. G.C. Services Limited Partnership*, 32 F. 2d 86 (4th Cir. 1994), where the court determined that child support obligations arising out of an administrative support order did not qualify as debts because the obligations were not incurred in exchange for goods and services.

The *Azar* court also considered *Zimmerman v. HBO Affiliate Group*, 834 F. 2d 1163 (3rd Cir. 1987), and *Straub v. Harris*, 626 F. 2d 275 (3rd Cir. 1980), in its decision. In *Zimmerman*, the court found that a demand letter sent

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[3] *See also, Vosatka v. Wolin-Levin, Inc.*, case no. 94 C 4129 (1995 WL 443950) (N.D. Ill. July 20, 1995) (assessments of condominium associations are not from a "transaction" allowing for deferred payments and are in nature of taxes so that they do not qualify as debts under the federal act; court dismissed the case for lack of subject matter jurisdiction); *Archer v. Beasley*, case no. 90-2576(CSF) (1991 WL 34889) (D. N.J. March 5, 1991) (assessment of condominium association not a debt under the federal act in part because no offer or extension of credit was made; defendant's motion for summary judgment granted).

from HBO to the plaintiff and others which demanded that illegal reception of an unauthorized HBO cable signal cease, that equipment be returned, and that the recipients of the letter pay $300 as an out of court settlement was not a debt under the federal act because there was no offer or extension of credit asserted. *Zimmerman*, 834 F. 2d at 1169. The court stated that a transaction which may give rise to a "debt" under the act "is a transaction in which a consumer is offered or extended the right to acquire 'money, property, insurance, or service' which are 'primarily for household purposes' and to defer payment." *Id.* at 1168-69. In *Straub*, the court held that a per capita tax levied by the local taxing authorities was not a "debt" under the act because, at a minimum, the debt must arise "as a result of the rendition of a service or purchase of property or other item of value." *Straub*, 626 F. 2d at 278. The court found that the relationship between taxpayer and taxing authority does not encompass that type of pro tanto exchange which the definition of "debt" envisions. *Id.*

In the instant case, the Bryans allege that Clayton & McCulloh demanded payment from the Bryans of the assessments levied by Amber Ridge, the interest on those assessments, as well as costs and attorneys fees for collecting those amounts. Complaint, ¶¶ 18-19. Further, the Bryans allege that the assessments levied by Amber Ridge were to be used exclusively to promote the recreation, health, safety, and welfare of the residents of the subdivision and for the improvement and maintenance of the common areas. Complaint, Par. 10. The assessments

were not alleged to be an "obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. sec. 1692a(5); sec. 559.55(1). There was no alleged offer or extension of credit. The assessments were not alleged to have arisen as a result of a transaction for personal or household related property or services. And, the assessments do not reflect deferred payments on a prior debt.

Clayton, McCulloh, and Clayton & McCulloh may not be considered "debt collectors" because under the reasoning of the cases discussed above, the amounts those defendants attempted to collect were not "debts" under the federal or state acts. As such, no claim for relief may be stated against these defendants under either act in the instant case.

Therefore, it is ORDERED that the defendants' motion for summary judgment and motion to dismiss is GRANTED.

DONE and ORDERED in Chambers, at Orlando, Orange County, Florida, this 7 day of May, 1996.

/s/ James C. Hauser
Honorable James C. Hauser
Circuit Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished, by U.S. mail/hand delivery to Stephan H. Price, Trickel, Leigh, & Mann, P.A. 39 West Pine Street, Orlando, Florida 32801; to Randy Hillman, 203 Hilicrest Ave., Orlando, Florida 32802, and to Kenneth M. Clayton, Clayton & McCulloh, 220 N. Palmetto Ave., Orlando, Florida 32801, on this 8 day of May, 1996.

/s/ Judi Rhyne
Judicial Assistant

IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,
Plaintiffs,

vs.

AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., A Florida corporation, and KENNETH M. CLAYTON and NEAL MCCULLOH, individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership,
Defendants.
_____/

FINAL JUDGMENT

(Filed Jul. 29, 1996)

THIS CAUSE arose pursuant to this Court's prior "Order Denying Plaintiffs' Motion to Reconsider and Vacate May 7, 1996 Order" dated June 13, 1996, in which this Court set a deadline of June 28, 1996, for Plaintiffs to file an Amended Complaint and, because Plaintiffs have not filed an Amended Complaint pursuant to this Court's prior Order, it is hereby

ORDERED AND ADJUDGED AS FOLLOWS:

1. For reasons set forth in this Court's "Order Granting Defendants' Motion for Summary Judgment

and Motion to Dismiss" dated May 7, 1996, Final Judgment is hereby granted in favor of the Defendants, KENNETH M. CLAYTON, NEAL McCULLOH, and CLAYTON & McCULLOH, and against the Plaintiffs. The Plaintiffs shall take nothing from their action(s) alleged against KENNETH M. CLAYTON, NEAL McCULLOH, and CLAYTON & McCULLOH.

2. This Court retains jurisdiction to determine entitlement of the above-referenced Defendants to an award of attorney fees and costs and in what, if any, amount.

3. This Court further retains jurisdiction as to Count III of Plaintiffs' Complaint which names AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., as Defendant, and further retains jurisdiction as to the Counterclaim of Defendants KENNETH M. CLAYTON, NEAL McCULLOH, and CLAYTON & McCULLOH.

DONE AND ORDERED in Chambers, Orlando, Orange County, Florida this 26 day of July, 1996.

/s/ James C. Hauser
James C. Hauser,
Circuit Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing final Judgment has been furnished by U.S. Mail to Stephen H. Price, Esquire, Trickel, Leigh & Mann, P.A., 39 West Pine Street, Orlando, Florida, 32801 and Kenneth M. Clayton, Esquire, Clayton & McCulloh, 220 North Palmetto Avenue, Orlando, Florida, 32801 on this 26th day of July, 1996.

/s/ Naomi C. Parker
Judicial Assistant

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA FIFTH DISTRICT

KEVIN E. BRYAN and
RENEE M. BRYAN,

Appellant,

v.

CASE NO.
96-2406

KENNETH M. CLAYTON,
et al.,

Appellee.

_____/

DATE: June 25, 1997

BY ORDER OF THE COURT:

ORDERED that Appellants' MOTION FOR CLARIFICATION, REHEARING, REHEARING EN BANC, AND CERTIFICATION, AND FOR ANCILLARY RELIEF, filed May 27, 1997, is denied.

I hereby certify that the foregoing is
(a true copy of) the original court order.

/s/ Frank J. Habershaw
FRANK J. HABERSHAW, CLERK

(COURT SEAL)

cc: Kenneth L. Mann, Esq.
Kenneth M. Clayton, Esq.
Randy Hillman, Esq.

Supreme Court of Florida

WEDNESDAY, JANUARY 28, 1998

KEVIN E. BRYAN, et al.,	**	
Petitioners,	**	
v.	**	CASE NO. 91,612
KENNETH M. CLAYTON, et al.,	**	5TH DISTRICT COURT OF APPEAL NO. 96-2406
Respondents.	**	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

KOGAN, C.J., and OVERTON, SHAW, WELLS and ANSTEAD, JJ., concur

Upon consideration of the Motion for Attorney's Fees filed in the above styled cause by the attorney for Respondents',

IT IS ORDERED that said Motion is hereby granted; the amount to be determined by the trial court. See Fla. R. App. P. 9.400(b), 351 So2d 981.

A True Copy

TEST:

/s/ Sid J. White
Sid J. White
Clerk,
Supreme Court
[SEAL]

H

cc: Hon. Frank J. Habershaw, Clerk
Hon. Fran Carlton, Clerk
Hon. James C. Hauser, Judge
Mr. Kenneth L. Mann
Mr. Kenneth M. Clayton
Mr. James E. Olsen

IN THE CIRCUIT COURT IN
AND FOR ORANGE COUNTY,
FLORIDA

CIVIL CASE NO. CI 95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,

Plaintiffs,

vs.

AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., a Florida corporation, and KENNETH M. CLAYTON and NEAL MCCULLOH individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership

Defendants.

COMPLAINT

The plaintiffs, KEVIN E. BRYAN and RENEE M. BRYAN (hereafter the "Bryans"), sue the defendants, AMBER RIDGE HOMEOWNERS ASSOCIATION, INC., a Florida corporation ("the Association"), and, Kenneth M. Clayton and Neal McCulloh, individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership (collectively "Clayton & McCulloh"), and say:

Allegations Common to All Counts

1. The Bryans are natural persons and residents of Ocoee, Orange County, Florida.

2. The Bryans are the owners and occupants of that property known as 2078 Hedgerow Circle, Ocoee, Florida, and more specifically described as follows:

> Lot 13, Amber Ridge, according to the plat thereof as recorded in Plat Book 29, Page 88, Public Records of Orange County, Florida

(hereafter, "the property").

3. The Association is a Florida non-profit corporation, engaged in the business of acting as a homeowners' association for the Amber Ridge subdivision, with its principal place of business located at 2015 Hedgeron Circle, Ocoee, Orange County, Florida.

4. The Association is responsible for the enforcement of the Declaration of Covenants, Conditions and Restrictions of Amber Ridge, found in official record book 4386, page 3234 of the public records of Orange County, Florida ("the Declaration").

5. The Bryans and all other homeowners of the Amber Ridge subdivision are required to be members in the Association.

6. Clayton & McCulloh is a Florida general partnership engaged in the practice of law with its principal place of business located in Orlando, Orange County, Florida.

7. Neal McCulloh and Kenneth M. Clayton are general partners of Clayton & McCulloh.

8. The Association has the power, pursuant to Article IV of the Declaration, to collect assessments and to bring an action at law against an owner for nonpayment.

9. The Association is responsible, pursuant to Article VIII of the Declaration, for the exclusive management, control and maintenance of the common areas and any improvements thereon. Pursuant to the same article, the Association has the duty to keep the common areas and any improvements thereon in good, clean, attractive and sanitary condition, order and repair.

10. The assessments levied by the Association are to be used exclusively to promote the recreation, health, safety, and welfare of the residents of the subdivision and for the improvement and maintenance of the common areas.

11. All conditions precedent to the Plaintiffs' right to bring this action have occurred, been performed or waived.

COUNT I – FAIR DEBT COLLECTION PRACTICES ACT

12. Plaintiffs reallege and incorporate ¶¶ 1 through 11 above as if fully set forth herein.

13. This is an action against Clayton & McCulloh under 15 U.S.C.A. § 1692, also referred to as the Fair Debt Collection Practices Act (hereafter referred to as "the Act").

14. This action does not exceed $15,000.00 exclusive of costs, interest and attorney's fees, but arises from the same set of facts as Count II of this complaint which confers jurisdiction in this matter.

15. At all times material, Clayton & McCulloh was a "debt collector" as defined by the Act.

16. At all times material, Clayton & McCulloh attempted to collect a "debt", as defined by the Act, from the Bryans.

17. At all times material, the Bryans were "consumers" as defined by the Act.

18. On or about December 1, 1994, Clayton & McCulloh sent the Bryans, via certified mail, a demand for the payment of assessments allegedly levied by the Association for the period beginning January 1993 through December 1994. A true copy of the demand letter is attached and incorporated as Exhibit "A".

19. In addition to the outstanding assessments, the letter demanded payment of interest at the rate of 12% per annum through November 1994, as well as costs and attorney's fees allegedly incurred through December 1, 1994.

20. The amount claimed by Clayton & McCulloh's demand letter as due and owing was $505.07.

21. Clayton & McCulloh's demand letter threatened the Bryans with a lien on the Bryan's property if the amount of $505.07 was not paid on or before December 14, 1994.

22. Clayton & McCulloh's demand letter further threatened the Bryans with foreclosure if the Bryans failed to pay the stated amount, together with any additional assessments, costs, interest and attorney's fees, within 30 days after the filing of the lien.

23. Clayton & McCulloh's demand letter told the Bryans' not to contact the Association nor the management company with any questions, but to communicate

only with the law firm, and yet also threatened that they would be charged additional costs and attorney's fees for any communications made by the Bryans to said law firm regarding their account, other than the full and immediate payment of the alleged debt.

24. In purported compliance with the Act, Clayton & McCulloh attached, as a third page, an exhibit outlining the Bryans' statutory right to dispute the debt and to request verification as well as the name and address of the creditor ("the validation notice").

25. However, the validation notice of Clayton & McCulloh also asserted that the thirty day verification period would not in any way lengthen the December 14, 1994 deadline.

26. On or about December 8, 1994, Kevin Bryan remitted the $505.07 requested by Clayton & McCulloh via certified mail. A true copy of the cashier's check payable to "Clayton & McCulloh", the receipt for certified mail and a copy of Kevin Bryan's transmittal letter are attached and incorporated as Exhibit "B".

27. Pursuant to the Act and Clayton & McCulloh's instructions, Kevin Bryan disputed the amount owed. He requested: written verification of said debt; the name(s) and address(es) of the current creditor(s); and an itemized billing statement.

28. On or about January 26, 1995, some 45 days later, Clayton & McCulloh returned the Bryans' cashier's check. A true copy of Clayton & McCulloh's rejection letter is attached and incorporated by reference as Exhibit "C".

29. Although the Bryans' payment was sent prior to the December 14, 1994 deadline, Clayton & McCulloh's rejection letter asserted the Bryans were delinquent for additional assessments, interest, costs, and attorney's fees, etc., above and beyond the debt originally demanded.

30. Clayton & McCulloh's rejection letter threatened the Bryans with additional collection procedures if the Bryan account were [sic] [not] brought current within 14 days from the January 26, 1995 communication.

31. In an effort to force immediate payment of the purported debt, Clayton & McCulloh's rejection letter represented that the law firm would continue to perform such tasks as "writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account" until the account was brought completely current.

32. Clayton & McCulloh's letter refused to provide the Bryans with the nature or the amount of the newly incurred costs or the total purportedly due. Rather, the Bryans were instructed to contact the firm to receive an exact payoff figure.

33. At the time of the January 26, 1995 rejection letter, Clayton & McCulloh had still not provided the Bryans with any verification of their debt or any of the other requested information.

34. The Bryans also sought information directly from the Association but were referred to Clayton & McCulloh for response thereto.

35. At the time of the January 26, 1995 rejection letter, neither Clayton & McCulloh nor the Association

had ever made demand for any additional assessments. In fact, the 1995 assessment had not been made, was not yet delinquent, and had not been turned over to Clayton & McCulloh for collection.

36. The Bryans did not remit any monies in response to Clayton & McCulloh's January 26, 1995 demand since payment had been fully tendered previously and rejected.

37. On or about January 30, 1995, Renee Bryan contacted Clayton & McCulloh to discuss the return of their cashier's check.

38. During the course of this conversation, personnel from Clayton & McCulloh threatened Renee Bryan with the imposition of additional fees, a lien, and the ultimate foreclosure of her home, if the balance, as determined by Clayton & McCulloh, were not paid immediately.

39. On or about February 2, 1995, Clayton & McCulloh placed a call to the Bryans.

40. During this conversation, Neal McCulloh claimed that the new balance owed by the Bryans was now $991.54, the increase from $505.07 being primarily attributable to purported additional attorney's fees.

41. Clayton & McCulloh told Mr. Bryan that a lien would be placed against his house, and foreclosure procedures would be commenced, if the new amount were not paid.

42. At the time of the telephone conversation, Clayton & McCulloh had still not provided the Bryans with

the verification of their debt or any of the other requested information.

43. On February 20, 1995, the Bryans lodged a formal complaint with the Association regarding its failure and refusal to administer and enforce the rules and restrictions of the Association. A true copy of Kevin Bryan's letter is attached and incorporated as Exhibit "D".

44. Along with the written complaint, the Bryans remitted the amount of $125.00, to be applied exclusively to the 1995 assessments. On information and belief, said check is currently held, uncashed, by Clayton & McCulloh.

45. On or about March 6, 1995, the Bryans received more correspondence from Clayton & McCulloh that purported to provide a written breakdown of the amounts owed to the Association by the Bryans. A true copy of the March 6, 1995 correspondence and the alleged verification of debt, (purportedly aggregating $1,196.56 as of February 4, 1995, including $836.26 in "costs, collection charges, and attorney's fees") is attached and incorporated as Exhibit "E".

46. Also included with the March 6, 1995 correspondence was a letter dated March 3, 1995 in which Clayton & McCulloh asserted the Bryans now owed the Association the amount of $1,199.80 including fees and interest. A true copy of the March 3, 1995 correspondence is attached and incorporated as Exhibit "F".

47. The March 3, 1995 correspondence also listed a "lien charge" in the amount of $125.00, purportedly levied against the Bryans.

48. In the March 3, 1995 correspondence, Clayton & McCulloh told the Bryans that once their account was paid in full, Clayton & McCulloh would provide the Bryans with a Release of Lien.

49. As of March 3, 1995, Clayton & McCulloh had not filed any lien against the Bryans in the public records of Orange County, Florida.

50. The March 3, 1995 correspondence failed to include any warning that Clayton & McCulloh was attempting to collect a debt and that any information obtained would be used for that purpose as required by the Act.

51. On or about June 21, 1995, some 110 days after the purported "lien charge" was imposed, a claim of lien was filed against the Bryans' property on behalf of the Association by Clayton & McCulloh. A true copy of the claim of lien is attached and incorporated as Exhibit "G" hereto. This lien was recorded in Official Records Book 4907, Page 2090 of the Public Records of Orange County, Florida.

52. The claim of lien asserted it secures assessments of $324.25, interest thereon, and attorney's fees and costs incidental to the enforcement of the lien.

53. All of the foregoing correspondence from Clayton & McCulloh and the telephone conferences constitute "communications", as defined by the Act.

54. The Bryans have hired the law firm of Trickel, Leigh & Mann, P.A. to represent them in this action and are obligated to pay said firm a reasonable attorney's fee.

55. Pursuant to 15 U.S.C.A. § 1692k, the Bryans are entitled, if they successfully enforce liability under the Act, to reasonable attorney's fees.

56. Clayton & McCulloh have violated the Act.

57. Clayton & McCulloh's violations of the Act include, but are not limited to, the following:

a. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(a) by attempting, in its December 1, 1994 communication, to cause the Bryans to disregard the statutory notice. The threat of a lien filing by December 14, 1994 contradicted and overshadowed the statutorily required notice.

b. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(a) by falsely stating that the Bryans' right to verification, as outlined in the Act, would not in any way lengthen the December 14, 1994 payment deadline imposed by Clayton & McCulloh.

c. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by attempting to imply that the language added by Clayton & McCulloh regarding the 30 day right of verification and its effect on the deadlines imposed was part of the Act and required for compliance.

d. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(a) by attempting to discourage the Bryans from pursuing their rights under the Act with promises of additional costs and attorney's fees in the event of any further communications with the firm.

e. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(2) by falsely representing the amount of the debt in its December 1, 1994 communication.

f. Clayton & McCulloh violated 15 U.S.C.A. §§ 1692e(2) and 1692f by falsely claiming the Bryans' cashier's check was for an insufficient amount and was not delivered in accordance with the terms and conditions imposed by Clayton & McCulloh's demand letter.

g. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(5) by threatening additional collection procedures which could not be legally performed until Clayton & McCulloh provided the proper debt validation information requested by the Bryans.

h. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by falsely representing in the January 26, 1995 communication that foreclosure was being pursued when no such action had been taken or could legally be taken.

i. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by falsely representing in its January 26, 1995 communication that the Bryans had incurred additional assessments, legal fees and costs since their December 8, 1994 tender of payment.

j. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(2) by falsely representing the services rendered on the Bryan account in its March 3, 1995 communication.

k. Clayton & McCulloh violated 15 U.S.C.A. § 1692g(b) by attempting to collect the alleged debt via threatening telephone conferences prior to providing the Bryans with the requested debt verification.

l. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(10) by falsely implying, in its March 3, 1995 communication, that a lien had been placed on the Bryans' property.

m. Clayton & McCulloh violated 15 U.S.C.A. § 1692e(2) by falsely representing, in its March 3, 1995 communication, the character and status of that portion of the alleged debt attributable to Clayton & McCulloh's collection efforts since the Bryans' December 8, 1995 verification request.

n. Clayton & McCulloh violated 15 U.S.C.A. § 1692f(1) by imposing additional costs on the Bryans for collection efforts which were not permitted by law.

o. Clayton & McCulloh violated 15 U.S.C.A. § 1692g by failing to ever respond to the Bryans' original verification request regarding the amount originally demanded ($505.07) by Clayton & McCulloh.

58. Clayton & McCulloh's acts as described above were done intentionally and maliciously in knowing and wilful violation of the Act, for the purpose of coercing the Bryans to pay the alleged debt without any basis in fact or law.

59. As a direct and proximate result of Clayton & McCulloh's conduct, the Bryans have suffered stress and embarrassment and have expended both time and money in an attempt to clear their name.

60. As a result of the above mentioned violations of the Act, the Bryans have suffered actual damages, including emotional distress, and are also entitled to statutory damages, court costs and attorney's fees.

WHEREFORE, the Bryans respectfully request that judgment be entered against Kenneth M. Clayton and Neal McCulloh, jointly and severally and d/b/a as Clayton & McCulloh for:

a. Actual damages;

b. Statutory damages of $1,000.00 pursuant to 15 U.S.C.A. § 1692k.

c. Costs and reasonable attorney's fees pursuant to 15 U.S.C.A. § 1692k.

d. Such other and further relief, including injunctive relief, as may be just and proper.

COUNT II – FLORIDA CONSUMER COLLECTION PRACTICES ACT

61. This is an action against Clayton & McCulloh for relief under §§ 559.55-559.785 Florida Statutes (hereafter the "Florida Act").

62. The Bryans reallege paragraphs 1-11 and 18-52 and 54 as if fully set forth herein.

63. This is an action which exceeds $15,000 exclusive of costs, interest and attorneys' fees.

64. At all times material, Clayton & McCulloh was a "debt collector" as defined by the Florida Act.

65. At all times material, Clayton & McCulloh attempted to collect a "debt", as defined by the Florida Act, from the Bryans.

66. At all times material, the Bryans were "consumers", as defined by the Florida Act.

67. Clayton & McCulloh's violations of the Florida Act include, but are not limited to, the following:

a. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by threatening additional collection procedures which could not be legally performed until Clayton & McCulloh provided the proper debt validation information requested by the Bryans.

b. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by falsely representing in the January 26, 1995 communication that foreclosure was being pursued when no such action had been taken or could legally be taken.

c. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by falsely representing in its January 26, 1995 communication that the Bryans had incurred additional assessments and expenses since their December 8, 1994 tender of payment.

d. Clayton & McCulloh violated § 559.72(9) *Fla. Stat.* (1994) by imposing additional costs and legal fees on the Bryans for collection efforts which were not permitted by law.

68. Clayton & McCulloh's acts as described above were done intentionally, and maliciously in knowing and wilful violation of the Florida Act, for the purpose of coercing the Bryans to pay the alleged debt.

69. As a direct and proximate result of Clayton & McCulloh's conduct, the Bryans have suffered stress and embarrassment and have expended both time and money in an attempt to clear their name.

70. As a result of the above mentioned violations and their mens rea, Clayton & McCulloh is liable to the

Bryans in accordance with the Florida Act, the greater of actual damages suffered by the Bryans, statutory damages in the amount of $500.00, together with punitive damages, court costs and reasonable attorney's fees.

WHEREFORE, the Bryans respectfully request that judgment be entered against Kenneth M. Clayton and Neal McCulloh, jointly and severally and d/b/a Clayton & McCulloh for:

a.The greater of actual damages suffered by the Bryans or statutory damages of $500.00 pursuant to § 559.77 *Fla. Stat.* (1994).

b.Punitive damages pursuant to § 559.77 *Fla. Stat.* (1994).

c.Costs and reasonable attorney's fees pursuant to § 559.77 *Fla. Stat.* (1994).

d.Such other and further relief, including injunctive relief, as may be just and proper.

COUNT III – DECLARATORY JUDGMENT

71. This is an action against the Association for declaratory judgment and supplemental relief under chapter 86, Florida Statutes.

72. The Bryans reallege paragraphs 1-11, 18-52 and 54 as if fully set forth herein.

73. As demonstrated by the aforementioned allegations, there exists an actual and justiciable controversy between Plaintiff and the Association.

74. Specifically, the Association has filed or caused to be filed a claim of lien in the public records of Orange

County, against the property of the Bryans, for the purported non-payment of assessments.

75. Despite collecting significant revenues from charges and assessments, the Association has refused, and continues to refuse, to enforce the covenants, conditions and restrictions outlined in the Declaration.

76. The Bryans are in doubt and uncertain as to whether the claim of lien is legally enforceable in view of: (a) the Bryans' timely tender of the outstanding amounts alleged by Clayton & McCulloh; (b) the Bryans' homeowner's assessment having been paid through March 31, 1993 at the closing when they purchased the property, at which time it was represented that homeowner's assessments were due on a March 31 fiscal year not a calendar fiscal year; (c) the failure of the Association to enforce the covenants, conditions and restrictions of the Declaration; and, (d) the Association's failure to ever furnish a true and reasonably detailed verification of the amount actually owed by the Bryans including the purported assessment by fiscal year.

77. Furthermore, the Bryans are in doubt and uncertain as to the right, power and duty of the Association to continue to collect assessments and charges while, at the same time, abdicating its responsibilities under the Declaration.

78. A judicial declaration concerning the Association's right, power and duty to enforce the covenants, conditions and restrictions of the Declaration is necessary and appropriate given the continuing decline of the common areas and the overall condition of the Association.

79. A judicial declaration concerning the continued role of the Association in the enforcement of the covenants, conditions and restrictions of the Declaration is necessary and appropriate in order to determine if the Association should continue to collect assessments or, in the alternative, if a receiver or professional management company should be appointed to manage the affairs of the Association.

WHEREFORE, the Bryans respectfully request that the court enter a judgment against the Association, as follows:

a. Declaring that the Association has failed to enforce the covenants, conditions and restrictions of the Declaration.

b. Declaring the lien filed by the Association null and void.

c. Enjoining the Association from assessing any charges or assessments or, in the alternative, impeaching the acting Board of Directors and Officers and appointing a receiver or professional management company to manage the affairs of the Association including the enforcement of the covenants, conditions and restrictions of the Declaration.

d. Awarding the Bryans damages;

e. Awarding the Bryans their reasonable attorney's fees and costs;

f. Granting such further or alternative relief as the Court deems just and proper.

DEMAND FOR JURY TRIAL

The Bryans demand a jury trial in this action of all issues triable by jury.

Dated this 8th day of August, 1995.

TRICKEL, LEIGH & MANN, P.A.

BY: /s/ Stephen H. Price
Stephen H. Price
Florida Bar No. 956937
39 W. Pine Street
Orlando, FL 32801
(407) 422-5154
Attorneys for Plaintiffs

EXHIBIT

A

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

December 1, 1994

CERTIFIED MAIL/RETURN RECEIPT REQUESTED P 399 873 643

Mr. and Ms. Kevin Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: DEMAND FOR ASSESSMENTS
AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.
UNIT #013

Dear Mr. and Ms. Bryan:

Please be advised that I have been retained by AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC. to collect the maintenance fees outstanding against the property owned by you within AMBER RIDGE for the time period commencing January 1993 and continuing until your account is brought current. The amount due and owing by you is $505.07, which sum includes Assessments for the time period of January 1993 through December 1994, interest at a rate of 12% per annum through November 1994, and costs and attorney's fees to

date. If said sum is not paid on or before December 14, 1994, a lien will be filed against the property. If said sum plus such additional assessments, costs, interest and attorney's fees as come due hereafter are still not paid within thirty days after that, the Association intends to pursue the legal remedies available to it, and/or foreclose on your property.

The amount due on your account will increase as assessments, costs, attorney's fees and other charges continue to accrue; therefore, just prior to making your payment be sure that you contact this office at the above phone number to obtain an exact payoff figure.

It is with regret that the Association has had to pursue the matter this far, but considering the period of time that this bill has remained unpaid, the Board of Directors have decided that this is the responsible approach to this problem.

Payments are to be made only **by cashier's check or money order payable to "Clayton & McCulloh"** and should be sent to the address of this law firm.

All telephone calls and discussions regarding this matter are to be directed to my Assistant, Mr. Jason Malone, at my office. Understand that costs and attorney's fees will be charged to you based on the time which this office expends in connection with your account. Extended or multiple discussions with you will cause your fees to increase. Please do not contact individual Board Members of the Association or the Management Company regarding this matter as they will only direct you to call my office.

Any proposed method of payment other than the entire amount will have to be presented to me in writing and approved by the Board of Directors for the Association at a regularly scheduled meeting. Additionally, any proposed payment agreement must be accompanied by a cashier's check in the amount of $150.00 made payable to "Clayton & McCulloh" to cover the attorney's fee associated with reviewing and processing the proposal through the Association. This fee shall be deemed earned by this law firm when received without regard to the disposition of the matter by the Association. Additionally, this fee shall not decrease the amount owed to the Association for assessments, interests, costs or other attorney and/or collection fees. In no event, shall this law firm be deemed at any time to represent you in this matter. Please be advised that this firm recommends that the Association not accept payment proposals with a payout term greater than six (6) months. If you must propose a payment plan, please keep the amounts of the proposed installments equal, and the term of the payout six (6) months or less. Please be further advised that if the $150.00 charge referenced above is not sufficient to defray all the costs and expenses associated with the payment agreement, such will be added to the total amount due the Association and will be collected in the same manner as other sums owed to the Association. Additionally, should the Association agree to allow you to pay your delinquent assessments on an "installment" basis, an additional $10.00 handling charge per installment will be added to your balance.

Additionally, for compliance with the Fair Debt Collection Act, please see Exhibit "A" attached hereto.

To avoid incurring additional costs and attorney's fees, you must bring your account current immediately.

Govern yourself accordingly.

Sincerely,

/s/ Neal McCulloh
Neal McCulloh

NM/JM

EXHIBIT

A

NOTICE: The undersigned attorney is attempting to collect a debt owed to the Association, and any information obtained will be used for that purpose.

Unless you, within thirty (30) days after your receipt of this letter, dispute the validity of the aforesaid debt (or any portion thereof) owing to the Association, the undersigned attorney shall assume that the said debt is valid. If you notify the undersigned in writing within the said thirty (30) day period that the aforesaid debt, or any portion thereof, is disputed, the undersigned attorney shall obtain written verification of said debt from the Association and/or a copy of the judgment against you. A copy of such verification or judgment will be mailed to you by the undersigned attorney's office. Upon your written request, within the thirty (30) day period, our office shall provide you with the name and address of the original creditor, if different from the current creditor. Note the thirty (30) day verification period referenced

above shall not in any way lengthen the deadline for payment in this letter.

EXHIBIT

B

Dec. 8, 1994

Dear Clayton & McCulloh,

I am sending you a cashiers check (019393) in the amount of 505.07, which is the full amount said owed to your firm.

Under the Fair Dept [sic] Collection Act, I am disputing the amount said owed. I am requesting a written verification of said dept [sic], along with the names and addresses of the current creditors and an itemized billing statement.

I expect this information within or on thirty days.

Sincerely,

/s/ Kevin Bryan
Kevin Bryan
2078 Hedgerow Circle
Ocoee Fl. 34761
Amber Ridge Unit #013

[Copy of Check and Postage Paid Receipt Omitted in Printing]

EXHIBIT

C

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

January 26, 1995

Kevin E. Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: DELINQUENT MAINTENANCE FEES
AMBER RIDGE UNIT #013

Dear Mr. Bryan:

Enclosed herewith please find your check(s) dated 12/06/94, in the amount of $505.07 made payable to "Clayton & McCulloh". Unfortunately, even if the enclosed check was credited to your account it would remain delinquent for assessments, interest, costs, attorney's fees, etc. including same accruing after the date of this letter.

Please be advised that if your account is not brought current within fourteen (14) days from the date of this letter that we will continue with collection procedures on your unit. Moreover, until your account is brought completely current, my office will be forced to spend additional time in pursuit of this matter doing such tasks as

writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account, all for which your account will be billed on an hourly basis. We do not wish to run up attorney's fees, costs, etc. on your account, however, until your account is brought current or foreclosure is completed, we will have no choice. We, therefore, strongly recommend that you bring your account current as soon as possible. Furthermore, just prior to making your final payment, it will be necessary for you to contact this office at the above telephone number to obtain an exact payoff figure, as the balance due can change on a day to day basis. As you have been previously advised, all payments must be made **by cashier's check or money order *only*** made payable to **"Clayton & McCulloh"** and sent to the address of this law firm.

We also recommend that you consider creating a local fund and/or means of making payment to the Association so that your account will remain current and future collection procedures will not be necessary.

Please also be informed that the following will not justify failure to pay your assessments as they become due:

1. Unit not ready for occupancy.
2. Defects in construction.
3. Disagreements with the Association's method of operating and/or managing the Association.
4. Disagreements with the Developer and/or Sales Agent.
5. Lack of use of common Elements.

The only reason we have not more actively pursued foreclosure on your account to date is your apparent attempts to resolve this matter. However, be that as it may, we must now insist that you make appropriate and timely arrangements to bring your account current; otherwise, further collection procedures will be instituted.

The undersigned attorney is attempting to collect a debt owed to the Association, and any information obtained will be used for that purpose.

Costs and attorney's fees have been incurred by the Association in connection with the collection of this account. To avoid incurring additional costs and attorney's fees, you must bring your account current immediately.

I hope this letter has sufficiently apprised you of the manner in which accounts in my office will be handled. We regret any inconvenience this matter has caused you, but we do intend to utilize all available and appropriate collection procedures.

Sincerely,
/s/ Neal McCulloh
Neal McCulloh

NM/

Enclosures

EXHIBIT

D

Feb. 20, 1995

Dear Board of Directors for Amber Ridge Homeowners Assoc.,

I am writing this letter to lodge a written complaint about the number of violations that have been allowed to take place in the Amber Ridge Neighborhood. There is satelite dishes, 3 radio tower, clothes line, boats parked in the driveway, yards not being kept up, the Amber ridge sign not on the front brick wall, dead flowers not being replaced, fencing along Adair St. are all different colors, broken cypress fence along Claracona Road, common properties along Claracona Road not being kept up and our drainage pond that has not been maintained.

Some of these concerns were previously brought up to the original Amber Ridge Home Owners Assoc. with no success of correction.

I feel that because of these violations, it has caused the property value of my home to decrease.

Your concern in these matters would be greatly appreciated!

Thank You,

/s/ Kevin Bryan
Kevin Bryan

Lot #13

EXHIBIT

E

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

March 6, 1995

Mr. and Mrs. Kevin Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: Verification of Debt

Dear Mr. and Mrs. Bryan:

Enclosed herewith please find the Verification of Debt which you requested. As said verification lists assessments through December, 1995 and interest through January, 1995, we presume you would like an update of the total amount owed including attorney fees, assessments, interest and other charges. Therefore, we have also included a payoff breakdown letter.

Until your account is brought completely current, my office will be forced to spend additional time in pursuit of this matter doing such tasks as writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account, all for which your account will be billed on an hourly basis. We do not wish to run up attorney's fees, costs, etc. on your account unnecessarily, however,

we will have no choice but to continue to pursue collection. We, therefore, strongly recommend that you bring your account current as soon as possible. **Furthermore, just prior to making your final payment, it will be necessary for you to contact this office at the above telephone number to obtain an exact payoff figure, as the balance due can change on a day to day basis.** We also recommend that you consider creating a local fund and/or means of making payment to the Association so that your account will remain current and future collection procedures will not be necessary.

Please be advised that if your account is not brought current within ten (10) days from the date of this letter that we will continue with collection procedures on your unit. As you have been previously advised, all payments must be made **by cashier's check or money order *only*** made payable to **"Clayton & McCulloh"** and sent to the address of this law firm.

The undersigned attorney is attempting to collect a debt owed to the Association, and any information obtained will be used for that purpose.

Costs and attorney's fees have been incurred by the Association in connection with the collection of this account. To avoid incurring additional costs and attorney's fees, you must bring your account current immediately.

If you have any questions or comments regarding this matter please call at your earliest possible convenience.

Sincerely,

/s/ Neal McCulloh
Neal McCulloh

NM/mec
Enclosure

VERIFICATION OF DEBT

Association (Creditor):
AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.

Association's Address:
C/O FLORIDA MANAGEMENT SERVICES OF ORLANDO
POST OFFICE BOX 73
ORLANDO, FLORIDA 32802

Unit or Lot Number:
UNIT 013

To: Unit or Lot Owner(s):
KEVIN E. BRYAN AND RENEE M. BRYAN

The undersigned, NEAL BAILEY the AGENT of the above-mentioned ASSOCIATION hereby verifies that the following sums are due and owing as assessments, interest, cost, collection charges and attorney's fees to the ASSOCIATION as of the date of the signing of this Verification:

(a.) $324.25 are assessments for January 1993 through December 1995 .

(b.) $36.05 for interest on assessments for January 1993 through January 1995 .

(c.) $836.26 for cost, collection charges and attorney's fees.

The total due as of February 4, 1995 is $1196.56 which sum shall increase as additional assessments, interest, cost, and attorney's fees come due.

DATED THIS 3 DAY OF March , 1995 .

BY: Neal Bailey

TITLE: Agent

EXHIBIT

F

Clayton & McCulloh

Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

KENNETH M. CLAYTON
NEAL McCULLOH
PETER R. McGRATH
CHRISTINE E. LONG

TEL (407) 425-4259
FAX (407) 425-4269

March 3, 1995

Mr. and Mrs. Kevin Bryan
2078 Hedgerow Circle
Ocoee, Florida 34761

RE: DELINQUENT HOMEOWNERS ASSOCIATION ASSESSMENTS AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.

Dear Mr. and Mrs. Bryan:

As you requested on December 8, 1994, I am hereby providing you with a written breakdown of the amount owed on this account. Once the account is paid in full, we will be happy to provide you with a Release of Lien.

The amounts due are itemized as follows:

Maintenance fees	01/93 thru 12/95	$ 324.25
Interest at 12%	01/93 thru 02/95	$ 39.29
Lien Charge		$ 125.00
Attorneys Fees & Costs		$ 556.26
Wind-up charge		$ 155.00
Total Due by March 16, 1995		**$1199.80**

All payments must be made by **cashier's check or money order *only*** made payable to **"Clayton & McCulloh"** and sent to the address of this law firm. If this account is not brought current within ten (10) days from the date of this letter, we will continue with collection procedures on the unit.

Understand that the Total Due specified above is in the nature of a settlement offer. As such, said figure does not reflect all the charges for the time expended by Attorneys and other professionals. Similarly, said figure may not reflect all the cost associated with this collection. Therefore, if the amount specified is not received in this office by the date indicated, said offer shall be null and void, and the Association reserves the right to pursue collection for all sums due (i.e., the total amount of Attorney fees and costs associated with collection of your account).

Please be advised that the amount due shall increase if any further work is required on this account other that [sic] just processing the payoff. Unless this account is brought completely current, my office will be forced to spend additional time in pursuit of this matter doing such tasks as writing letters, receiving payments, pursuing foreclosure, and dealing with the overall account, all for which your account will be billed on an hourly basis. We do not wish to run up attorney's fees, costs, etc. on your account, however, until your account is brought current or foreclosure is completed, we will have no choice but to pursue this matter further.

Sincerely,

Neal McCulloh

NM/mec

EXHIBIT

G

[Recorded June 21, 1995
in O.R. Book 4907, Pg 2090,
Orange County, Florida]

CLAIM OF LIEN

NOTICE IS HEREBY GIVEN that **AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.**, hereinafter referred to as "Association", (the Registered Agent of which is Gary Russell, 608 East Central Boulevard, Orlando, Florida 32801) pursuant to the provisions of the DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS OF AMBER RIDGE recorded in Official Records Book 4386, Page 3234, of the Public Records of Orange County, Florida, as amended and supplemented, claims a lien for unpaid assessments, interest and collection charges, together with costs and attorney's fees incurred by the Association incident to the collection of such assessments or enforcement of such lien, upon real property more particularly described as follows:

> Lot 13, AMBER RIDGE, according to the plat thereof as recorded in Plat Book 29, Page 88, Public Records of Orange County, Florida.

The name and address of the owner of record is:

> Kevin E. Bryan and Renee M. Bryan
> 2078 Hedgerow Circle
> Ocoee, Florida 34761

This claim of Lien is to secure the assessment(s) and other expenses levied by the Association in the amount and for the dates indicated and for such other sums as may become due thereafter:

A) Assessments in the amount of $324.25 for the time period of January 1993 through December 1995.

B) Together with interest at 12% per annum from the time each and every assessment has and shall come due, collection charges, attorney's fees, title search expenses and other costs incidental to the enforcement of this lien.

WITNESS MY HAND AND SEAL this 30th day of May, 1995.

Lienor:
AMBER RIDGE HOMEOWNER'S ASSOCIATION, INC.

WITNESSES

(sign) /s/ James R. Morgan

(print) /s/ James R. Morgan

(sign) /s/ Rick Glass

(print) /s/ Rick Glass

(sign) /s/ Linda L. Santo

(print) /s/ LINDA L. SANTO

(title) /s/ President

(address) /s/ 2015 Hedgerow Cir.
Ocoee, Fl 34761

STATE OF FLORIDA
COUNTY OF Orange

THE FOREGOING INSTRUMENT was acknowledged before me this 30th day of May, 1995 by Linda Santo, as President of AMBER RIDGE HOMEOWNER'S

ASSOCIATION, INC., a Florida Corporation, on behalf of the corporation. He/she is personally known to me or has produced _____ as identification.

NOTARY PUBLIC

(sign) /s/ Susan D. Falls

(print) /s/ Susan D. Falls

State of Florida at Large
My Commission Expires:

THIS INSTRUMENT PREPARED BY:
Neal McCulloh, Esquire
Clayton & McCulloh
Attorneys at Law
220 North Palmetto Avenue
Orlando, Florida 32801

FAIR DEBT COLLECTION PRACTICES ACT, 15 USCA

§ 1692. Congressional Findings and Declaration of Purpose

(a) There is abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors. Abusive, debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.

(b) Existing laws and procedures for redressing these injuries are inadequate to protect consumers.

(c) Means other than misrepresentation or other abusive debt collection practices are available for the effective collection of debts.

(d) Abusive debt collection practices are carried on to a substantial extent in interstate commerce and through means and instrumentalities of such commerce. Even where abusive debt collection practices are purely intrastate in character, they nevertheless directly affect interstate commerce.

(e) It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.

(Pub.L. 90-321, Title VIII, § 802, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 874.)

§ 1692a. Definitions

As used in this subchapter –

(1) The term "Commission" means the Federal Trade Commission.

(2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.

(3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.

(4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.

(5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

(6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or

due or asserted to be owed or due another. * * * The term does not include –

* * *

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

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§ 1692e. False or misleading representations

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

* * *

(2) The false representation of –

(A) the character, amount, or legal status of any debt or

(B) any services rendered or compensation which may be lawfully received by any debt collector for the collection of a debt.

* * *

(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.

* * *

(10) The use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer.

* * *

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* * *

§ 1692f. Unfair practices

A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

(1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law.

* * *

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§ 1692g. Validation of debts

(a) Notice of debt; contents

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing –

(1) the amount of the debt;

(2) the name of the creditor to whom the debt is owed;

(3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;

(4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and

(5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

(b) Disputed debts

If the consumer notifies the debt collector in writing within the thirty-day period described in subsection (a)

of this section that the debt, or any portion thereof, is disputed, or that the consumer requests the name and address of the original creditor, the debt collector shall cease collection of the debt, or any disputed portion thereof, until the debt collector obtains verification of the debt or a copy of a judgment, or the name and address of the original creditor, and a copy of such verification or judgment, or name and address of the original creditor, is mailed to the consumer by the debt collector.

* * *

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* * *

BANKRUPTCY CODE, 11 U.S.C.A.

§ 101 Definitions – In this title

* * *

(8) "Consumer debt" means debt incurred by an individual primarily for a personal, family, or household purpose;

* * *

TRUTH IN LENDING ACT, 15 U.S.C.A.

§ 1601. Congressional findings and declaration of purpose

(a) The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

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§ 1602. Definitions and rules of construction

(a) The definitions and rules of construction set forth in this section are applicable for the purposes of this subchapter.

* * *

(d) The term "person" means a natural person or an organization.

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required; and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness or, if there is no such evidence of indebtedness, by agreement. * * *

* * *

(h) The adjective "consumer", used with reference to a credit transaction, characterizes the transaction as one in which the party to whom credit is offered or extended is a natural person, and the money, property, or services which are the subject of the transaction are primarily for personal, family or household purposes.

[119 F.3d 477]

Terrence NEWMAN and Michelle Newman,
Plaintiffs-Appellants,

v.

BOEHM, PEARLSTEIN & BRIGHT, LIMITED,
Defendant-Appellee.
David J. RITER and Kathy Riter,
Plaintiffs-Appellants,

v.

MOSS & BLOOMBERG, LIMITED,
Defendant-Appellee.

Nos. 96-2839, 96-2841.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 22, 1997.

Decided July 2, 1997.
Rehearing Denied Sept. 12, 1997.

Carlo G. D'Agostino, Chicago, IL, James Shedden, David J. Philipps (argued), Steven J. Tomiello, Catherine Lee Gemrich, Beeler, Schad & Diamond, Chicago, IL, for Plaintiffs-Appellants in No. 96-2839.

Daniel F. Konicek (argued), Connelly & Schroeder, Geneva, IL, for Defendants-Appellees.

Joanne Faulkner, New Haven, CT, for Amicus Curiae National Association of Consumer Advocates, Inc., National Consumer Law Center, Inc., Consumer Law Center of the South.

Arthur L. Klein, Michael C. Kim, Allan Goldberg, David M. Bendoff, Arnstein & Lehr, Chicago, IL, Thomas J. Hindman, Lauren C. Groh, Orten, Hindman & Jordan, Denver, CO, Stephen M. Marcus, Marcus, Goodman,

Emmer & Brooks, Braintree, MA, for Amicus Curiae Community Associations Institute.

Charles M. Steinberg, Chicago, IL, for Amicus Curiae Near North Association of Condominium Presidents.

James Shedden, David J. Philipps (argued), Catherine Lee Gemrich, Michael S. Hilicki, Beeler, Schad & Diamond, Chicago, IL, for Plaintiffs-Appellants in No. 96-2841.

Before CUDAHY, ROVNER, and EVANS, Circuit Judges.

ILANA DIAMOND ROVNER, Circuit Judge.

The question presented by these appeals, one of first impression in the circuits, is whether an assessment owed to a homeowners or condominium association qualifies as a "debt" under the Fair Debt Collection Practices Act (the "FDCPA" or "Act"), 15 U.S.C. §§ 1692 *et seq.* Guided by our recent decision in *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir.1997), which interprets the term "debt" under that Act, we hold that it does. We therefore reverse the district court's contrary judgment and remand for further proceedings.

I.

In August 1995, Terrence and Michelle Newman received a collection letter from defendant Boehm, Pearlstein & Bright, Ltd., which the law firm sent on behalf of the Board of Directors of the Bridlewood Village Condominium Association. The letter informed the Newmans that they were in default on their obligation to pay a "proportionate share of the common expenses" due the

association as required by the condominium ownership declaration and the association's by-laws. The amount due, according to the letter, was $421.31, which included past-due assessments, late fees, interest, and attorney's fees. The letter stated that if the amount demanded was not paid within thirty days, the association would commence proceedings to obtain possession of the Newmans' condominium unit.

Approximately one month later, David and Kathy Riter received a similar letter from Moss & Bloomberg, Ltd., a law firm representing the Greenbrook Tanglewood Homeowners Association. This letter indicated that the Riters owed $443.60 to the association and that a certified check in that amount should be sent within ten days. Barring that, the letter warned, Moss & Bloomberg would proceed with a "30-day Notice Demand for Possession" unless it was notified in writing that the Riters were disputing the amount owed.

After receiving these letters, the Newmans and Riters filed separate actions under the FDCPA, alleging that the defendant law firms had failed to comply with that statute's requirements. Both the Newmans and Riters specifically alleged that defendants had violated 15 U.S.C. § 1692g by failing to include in their collection letters the validation notice required by that section. *See Avila v. Rubin,* 84 F.3d 222, 226 (7th Cir.1996) (discussing validation notice requirement). Both couples also alleged violations of section 1692e(11) in that the letters they received did not expressly disclose that defendants were attempting to collect a debt and that any information obtained would be used for that purpose. The Newmans further alleged that Boehm, Pearlstein had violated section 1692e

in one additional way – by falsely implying that legal proceedings on the alleged debt had already been initiated. The Newmans and Riters each sought statutory damages, costs, and attorney's fees in accordance with 15 U.S.C. § 1692k(a). Finally, both couples asked the district court to certify a class comprised of all individuals who had received similar letters from the defendant law firms and to appoint plaintiffs as class representatives. They also asked the court to appoint their attorneys (both couples were represented by the same counsel) as class counsel.

Moss & Bloomberg moved to dismiss the Riters' complaint for lack of subject matter jurisdiction, arguing that the past-due assessments referenced in its collection letter did not qualify as a "debt" under the Act. *See* 15 U.S.C. § 1692a(5) (defining a "debt" covered by the FDCPA). The district court granted the law firm's motion, holding that the assessments at issue were not encompassed by the statutory definition of a "debt." *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D.Ill.1996). In reaching that conclusion, the court noted that a number of courts had construed the term "debt" in the Act as requiring an offer or extension of credit to a consumer. *Id.* at 211 (citing, *inter alia, Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168-69 (3d Cir.1987)). The district court observed that based upon that interpretation of the Act, the lower courts had uniformly held that an assessment owed to a homeowners or condominium association did not qualify as a "debt" because it did not satisfy the "credit" requirement. *Id.* at 211-12. Although it described the Riters' contrary argument as "not entirely unsound," the district court refused to buck the trend that was developing in

the lower courts. *Id.* at 212. It therefore dismissed the Riters' complaint for lack of subject matter jurisdiction.

After issuing its decision in *Riter*, the district court granted Boehm, Pearlstein's motion to reassign the Newmans' case to it under the court's local rule. The district court then dismissed the Newmans' complaint sua sponte under *Riter*. The Newmans and Riters appealed separately to this court, and we consolidated their appeals for oral argument and disposition.

II.

The FDCPA defines a "debt" in the following way:

> The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.

15 U.S.C. § 1692a(5). The bulk of the briefing in these appeals is addressed to whether this definition requires that there be an offer or extension of credit, and thus some type of deferred payment obligation, as the Third Circuit determined in *Zimmerman*. *See* 834 F.2d at 1168-69. The district court followed *Zimmerman* and the weight of lower court authority in concluding that it did. *Riter*, 932 F.Supp. at 212. From that premise, the court reasoned that the Riters' obligation to pay past-due assessments to their homeowners association did not involve an offer or extension of credit, or a deferred payment obligation. *Id.*

But after we heard argument in these appeals, another panel of this court expressly rejected *Zimmerman's* "credit" requirement and held that "an offer or extension of credit is not required for a payment obligation to constitute a 'debt' under the FDCPA." *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322, 1326 (7th Cir.1997). All that is required under *Bass* is a transaction creating an obligation to pay. *Id.* at 1325. Based upon that understanding, the *Bass* panel concluded that the payment obligation arising from a dishonored check qualifies as a "debt" under the Act. *Id.*;[1] *see also Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir.1997) (following *Bass*).

To our knowledge, no federal court has yet concluded that the obligation to pay a condominium assessment constitutes a "debt" under the FDCPA. Yet the few courts to have considered that question have all employed *Zimmerman's* interpretation of that statutory term. *See Riter*, 932 F.Supp. at 211-12; *Vosatka v. Wolin-Levin, Inc.*, No. 94 C 4129, 1995 WL 443950, *7-9 (N.D.Ill. July 21, 1995); *Azar v. Hayter*, 874 F.Supp. 1314, 1318-19 (N.D.Fla.1995), *aff'd. without op.*, 66 F.3d 342 (11th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 712, 133 L.Ed.2d 666 (1996); *Archer v. Beasley*, Civ. No. 90-2576(CSF), 1991 WL 34889, *6 (D.N.J. Mar. 5, 1991). Having rejected *Zimmerman's* "credit" requirement in *Bass*, we now write on a clean slate.

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[1] Because it rejected *Zimmerman's* "credit" requirement, the *Bass* panel circulated its opinion to the active judges of the circuit in accordance with Circuit Rule 40(e). No judge favored a rehearing en banc. *See Bass*, 111 F.3d at 1330 n. 14.

The Riters and Newmans assert that their obligation to pay past-due assessments qualifies as a "debt" because the obligation arose from the purchase of the underlying property units. According to plaintiffs, the purchase of their homes is the "transaction" to which section 1692a(5) refers even if the precise amount and timing of future assessments had not yet been determined. Defendants disagree, of course, but they do so by resorting to the now-discredited "credit" requirement. They assert that because an assessment generally is paid by unit owners before any goods or services are provided by the association, there is no transaction involving an extension of credit or deferred payment. Yet because *Bass* holds that no extension of credit or deferred payment is required, defendants' argument must fail.

By paying the purchase price and accepting title to their home, the Riters became bound by the Declaration of Covenants, Conditions, and Restrictions of their homeowners association, which required the payment of regular and special assessments imposed by the association. The Newmans similarly became obligated upon the purchase of their condominium unit to pay any assessments pursuant to the condominium ownership declaration and the by-laws of their association, as well as under an Illinois statute addressed to condominium property. *See* 765 ILCS 605/9. It is therefore clear that the obligation to pay in these circumstances arose in connection with the purchase of the homes themselves, even if the timing and amount of particular assessments was yet to be determined. *Cf. In re Rosteck*, 899 F.2d 694, 696 (7th Cir.1990) (obligation to pay condominium assessments arose upon purchase of unit, thereby satisfying Bankruptcy Code's

definition of "debt"). Because the statute's definition of a "debt" focuses on the transaction creating the obligation to pay (*Bass*, 111 F.3d at 1325), it would seem to make little difference under that definition that unit owners generally are required to pay their assessments first, before any goods or services are provided by the association. That would only be important if the statute required a credit obligation, which *Bass* says it does not. 111 F.3d at 1326. Regardless of whether the assessment or the service comes first, the obligation to pay is derived from the purchase transaction itself. The assessments at issue in this case therefore qualify as "obligation[s] of a consumer to pay money arising out of a transaction." 15 U.S.C. § 1692a(5).

Not all such obligations are "debts" under the Act, however, for "the money, property, insurance, or services which are the subject of the transaction" must primarily be "for personal, family, or household purposes." *Id.* We have concluded that the relevant transactions in these cases were the purchase of the family homes, and on that general level, there can be little doubt that the subject of those transactions had a personal, family, or household purpose. More specifically, however, we also believe that the assessments themselves satisfy that statutory requirement. To the extent that the assessments were to be used to improve or maintain commonly-owned areas, that purpose, too, qualifies as "personal, family, or household." In our view, when a special assessment is used to repair a common roof, or a monthly assessment is used to pay for services like snow removal from a common walkway or landscaping of a common yard, the assessments are for a household purpose even if more than a single household

benefits. We thus are unable to agree with defendants' suggestion that because all unit owners benefit, assessments like these can be likened to past-due tax obligations, which are not considered "debts" under the Act because they generally are used for communal rather than personal, family, or household purposes. *See Staub v. Harris*, 626 F.2d 275, 278 (3d Cir.1980) (taxes are used for more general purposes than the statute requires, as they provide funds for "prisons, roads, defense, courts and other governmental services"); *see also* Federal Trade Commission – Statements of General Policy or Interpretation Staff Commentary on the Fair Debt Collection Practices Act, 53 Fed.Reg. 50097, 50102 (1988) (unpaid taxes not "debts" under the Act).[2] The assessments here have a more specific household purpose than taxes collected by a governmental entity. Rather than generally providing for government services, these assessments are collected in order to improve and maintain commonly-owned areas used by each unit owner. The assessments thereby directly benefit each household in the development. As a result, the assessments have a "personal, family, or household purpose." *See Archer*, Civ. No. 90-2576(CSF),

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[2] This FTC policy statement is not entitled to conclusive weight in the courts (*see Heintz v. Jenkins*, 514 U.S. 291, 296-99, 115 S.Ct. 1489, 1492-93, 131 L.Ed.2d 395 (1995)), as it reflects only the current enforcement position of the Commission's staff, which is not binding on the Commission itself. *See* Policy Statement, 53 Fed.Reg. at 50101. In cases interpreting the FDCPA, however, we take note of the staff's position and accord it due weight. *Bass*, 111 F.3d at 1327 n. 8. In that regard, we note here that the staff believes that past-due condominium assessments qualify as "debts" under section 1692a(5). *See* Policy Statement, 53 Fed.Reg. at 50102.

1991 WL 34889, at *4-5 (rejecting argument that condominium assessments can be likened to local taxes).

III.

Because the past-due assessments owed by the Newmans to their condominium association and by the Riters to their homeowners association qualify as "debts" under the FDCPA, the district court had subject matter jurisdiction to adjudicate plaintiffs' claims. *See* 15 U.S.C. § 1692k(d).[3] For this reason, we reverse the district court's judgment in each case and remand for further proceedings.

REVERSED AND REMANDED.

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[3] We note, finally, that the defendant law firms have not asserted that they are not "debt collectors" under the Act. The FDCPA applies only to the debt collection activities of a third party who is collecting a debt owed to another, as plaintiffs allege the defendant law firms were doing here. *See* 15 U.S.C. § 1692a(6). As a result, the Act would not also apply to the activities of a homeowners or condominium association in collecting a debt on its own behalf. *See* 15 U.S.C. § 1692a(6)(A) (term "debt collector" does not include "any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor").

[969 F.Supp. 604]

Jarrett E. THIES and Jacquelyn D. Thies, Plaintiffs,

v.

The LAW OFFICES OF WILLIAM A. WYMAN and Champs/The Kelly Group, Defendants.

No. CIVIL 97-0734 B (CGA).

United States District Court, S.D. California.

July 23, 1997.

Michael Ernest Doukas and Harold M. Hewell, San Diego, CA, for plaintiffs.

Eric D. Morton, Carlsbad, CA, for defendants.

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

BREWSTER, District Judge.

On May 16, 1997, Defendants filed a motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6). Plaintiffs are represented by Michael Ernest Doukas and Harold M. Hewell. Defendants are represented by Eric D. Morton. After careful consideration of the moving and opposing papers and for the reasons discussed in detail below, the Court hereby DENIES Defendants' motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6).

I. Case Type and Jurisdiction

Plaintiffs Jarrett E. Thies and Jacquelyn D. Thies bring this action under the Fair Debt Collection Practices

Act, 15 U.S.C. § 1692, et seq. ("FDCPA") seeking damages and other relief. Plaintiffs allege that Defendants, The Law Offices of William A. Wyman ("Wyman") and Champs/The Kelly Group ("Kelly"), violated the FDCPA while attempting to collect past-due homeowners association fees plus costs and attorney fees from Plaintiffs. Defendants move for a Rule 12(b)(6) dismissal on grounds that Plaintiffs fail to state a claim upon which relief can be granted. More specifically, Defendants claim that Plaintiffs do not owe a "debt" as statutorily defined by FDCPA and cannot seek relief pursuant to this statute. Jurisdiction is proper under 28 U.S.C. § 1331 and 15 U.S.C. § 1692k(d).

II. Background

Plaintiffs own a house within the View Terrace Development in Escondido and are members of a homeowners association, the View Terrace Association ("Association"). The Association improves and maintains common areas within the development. In or about June 1996, Plaintiffs noticed that a common area adjacent to their home was in disrepair. Plaintiffs were unsuccessful in their attempts to have the Association maintain or repair the area. Based on the Association's failure to respond to their requests, Plaintiffs withheld their homeowner association fees for two months.

In August 1996, Plaintiffs resumed payment to the Association in care of Defendant Kelly and mailed a check for the past-due fees including late fees ($176.00) in mid-September. Soon after, Plaintiffs received a letter from Defendant Wyman which notified Plaintiffs that

they owed $186.00 plus $30.00 in attorney fees. The letter also threatened recordation of a lien against Plaintiffs' property for the amount owed. In October 1996, Plaintiffs sent a check for their monthly dues plus late charges ($88.00); Defendant Wyman returned their September check of $176.00 because it did not represent the entire amount due. Plaintiffs continued to send checks for payments and late fees non-inclusive of attorney fees, and Defendant Wyman continued to return the checks through March 1997. Defendants filed a claim against Plaintiffs, and on March 11, 1997, a Municipal Court of the County of San Diego entered default judgment against the Plaintiffs in the amount of $1314.88.

III. Discussion

A. Standard of Law

Under Rule 12(b)(6), a defendant may seek to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In making this determination, the Court must assume that the plaintiff's allegations are true and must draw all reasonable inferences in the plaintiff's favor. *See Usher v. Los Angeles*, 828 F.2d 556, 561 (9th Cir.1987).

B. Plaintiffs' Cause of Action

The issue contained within this motion is whether or not homeowners association fees fall within the statutory definition of "debt" for the purposes of the FDCPA. A "debt" as defined by the FDCPA is (1) an obligation or alleged obligation of a consumer to pay money (2) arising

out of a transaction in which (3) the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes. *See* 15 U.S.C. § 1692a(5). Such an obligation does not need to be reduced to a judgment in order to fall under the protection of the FDCPA. *See id.*

A consumer for the purposes of this statute is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. § 1692a(3). Plaintiffs are consumers within the purview of the statute as they are natural people and are obligated to pay their homeowners association fees because of a covenant that runs with their property.

1. What Is A Transaction?

There is considerable confusion and conflict in the federal courts as to what a "transaction" is for the purposes of this statute. The statute requires in part that a "debt" encompass an obligation to pay that arises out of "a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). The Ninth Circuit recently addressed the meaning of transaction within the FDCPA's definition of "debt." It held that the FDCPA is not limited to debts arising out of the offer or extension of credit. *See Charles v. Lundgren & Associates, P.C.*, 119 F.3d 739, ___, No. 96-15995, 1997 WL 370884, at *3, (9th Cir. July 8, 1997) (holding that a dishonored check used to pay for restaurant meal creates a "debt" under the FDCPA). In its

opinion, the Ninth Circuit adopted in whole the reasoning of the Seventh Circuit in *Bass v. Stolper, Koritzinsky, Brewster, & Neider, S.C.*, 111 F.3d 1322 (7th Cir.1997).

In *Bass*, the Seventh Circuit interpreted the meaning of "transaction" under the FDCPA. It held that an offer or extension of credit was not required to constitute a debt for the purposes of the statute; the obligation to pay on a transaction, such as a dishonored check, created a debt. *See Bass*, 111 F.3d at 1326. The Seventh Circuit reasoned that the plain meaning of the statute, the congressional intent, and the legislative history supported a broad interpretation of "transaction." *See id.* Citing the legislative history of the FDCPA to support its position, the Seventh Circuit stated that "[e]arly versions of the Act clearly included a credit extension requirement in defining 'debt'. . . . We find it persuasive the fact that [the term 'credit'] was deleted from later drafts, and no reference to 'credit' was ever re-inserted in the definition." *Id.* at 1327. The court also cited a House Report stating the drafters' intent that "the term 'debt' include consumer obligations paid by check or other non-credit consumer obligations." *Id.* at 1327 (quoting H.R.Rep. No. 95-131, 95th Cong., 1st Sess. 4 (March 29, 1977)). Furthermore, as the court pointed out, it is prohibited from "reading into clear statutory language a restriction that Congress itself did not include." *Id.* at 1326 (citing *Hubbard v. United States*, 514 U.S. 695, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995)).

In contrast to the Seventh and Ninth Circuits, the Third Circuit construed "transaction" as requiring an offer or extension of credit. In dicta, it held that a debt under FDCPA is "a transaction in which a consumer is offered or extended the right to acquire 'money, property,

insurance, or services' which are 'primarily for household purposes' and to defer payment." *Zimmerman v. H.B.O. Affiliate Group*, 834 F.2d 1163 (3rd Cir.1987) (holding that tort liability to pay for pirated cable signal is not consumer debt) (quoting 15 U.S.C. § 1692a(5)).

In addition to being bound by the Ninth Circuit precedent in *Charles*, the Court finds the Seventh Circuit's reasoning, which the Ninth Circuit adopted in whole, more persuasive than the Third Circuit's reasoning. The legislative history reflects Congress' intent that the FDCPA apply to all kinds of consumer transactions, not just credit transactions. Following this intent, the Ninth and Seventh Circuits construed "transaction" generally without the additional requirement of an extension or offer of credit.

Plaintiffs are obligated to pay their homeowner fees because of a covenant running with their property. Because no offer or extension of credit is required, the Court finds that a transaction, for the purposes of the FDCPA, arises out of Plaintiffs' obligation to pay dues for the services of the Association.

2. Primarily for Personal, Family or Household Purposes

Having established that Plaintiffs' obligation to pay money for services is a transaction, the Court addresses whether the "money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5). The subject of the transaction is the services

Plaintiffs receive from the fees that they pay to the Association. The only question that remains is whether or not such association fees are primarily for personal, family, or household purposes.

Only once has the Ninth Circuit interpreted the meaning of the clause "primarily for personal, family, or household purposes." It concluded that a personal loan for business purposes did not conform to this qualification and did not constitute a debt under the FDCPA. *See Bloom v. I.C. System, Inc.*, 972 F.2d 1067, 1068 (9th Cir.1992) (holding that, personal loan used for venture capital in a software company is not primarily for personal, family, or household purposes). This precedent, however, is not particularly instructive for the purposes of the instant case.

Defendants cite district court cases from other circuits that decline to construe homeowner/condominiun association fees as a "debt" under the FDCPA. A district court in Virginia found that an assessment by the subdivision for maintenance of a private road was not "primarily for personal, family, or household [purposes]." *Nance v. Petty, Livingston, Dawson & Devening*, 881 F.Supp. 223, 225 (W.D.Va.1994) (citing 15 U.S.C. § 1692a(5)). A district court in Florida reasoned that condominium fees were not consumer debt since "[t]here [was] no evidence of a pro tanto exchange." *Azar v. Hayter*, 874 F.Supp. 1314, 1318 (N.D.Fla.), *aff'd*, 66 F.3d 342 (11th Cir.1995). The *Azar* court likened the condominium fees in its case to the per capita tax in *Staub v. Harris*, 626 F.2d 275, 278 (3rd Cir.1980). In *Staub*, the court found that taxes "primarily finance governmental functions, such as schools, police and fire protection, which secondarily may benefit an

individual resident or household" and therefore do not constitute a "debt" under the FDCPA. *Staub*, 626 F.2d at 277-78 (quoting lower court decision).

Defendants also cite an Illinois district court case which held that condominium fees were not "debt" because they "operate to provide communal goods and services which only indirectly benefit the payer." *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210, 211 (N.D.Ill.1996). Recently, however, *Riter* was overturned by the Seventh Circuit in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir.1997) (holding that past-due condominium fees are a debt under the FDCPA). In *Newman*, the Seventh Circuit held that "assessments . . . used to improve or maintain commonly-owned areas . . . qualifies as 'personal, family, or household.' " *Newman*, 1997 WL 375341 at *4, 119 F.3d at ___. In finding that taxes are not like condominium fees, the Seventh Circuit stated, "Rather than providing for government services, these [condominium] assessments are collected in order to improve and maintain commonly-owned areas used by each unit owner. The assessments thereby directly benefit each household in the development." *Id.*

The Court finds that the arguments from cases cited by Defendants unduly narrow the application of the FDCPA. The FDCPA has no requirement that a service "directly" benefit the consumer, as the *Riter* court concluded, nor does the plain language of the FDCPA require a "pro tanto exchange" as the court in *Azar* did. The Court declines to follow these unwarranted restrictions, and applies the reasoning in *Newman* to homeowner association fees. The Court finds that homeowner association fees for maintenance and improvement of common areas

within a housing development are a service primarily for personal, family, and household purposes.

The fact that many households may use or benefit from a common area does not logically diminish the "primary" nature of the service. For example, if a consumer failed to pay his membership dues to a health club, there would be no question that this would create a "debt" under the FDCPA because the obligation to pay for the services rendered would be primarily for his personal purposes. The debt to the health club would be no different merely because other members also used the services of the club, nor would the debt change if the consumer never used the services of the health club but was still under contract to pay dues. A homeowners association is akin to a health club or other exclusive group. A homeowner, by purchasing the property, is under a contractual agreement to be a "member of the club." With the payment of dues come the services provided by the Association – use of the common areas improved and maintained with the dues. If the association maintains a swimming pool or tennis courts, they are services available for the exclusive use of the members. The purpose of these services do not become "secondary" or "indirect" merely because other members may also use them.

The maintenance and improvement of common areas also serve a "personal, family, or household purpose" as required by the FDCPA. Many times association fees are applied to such purposes as painting the outside of or re-roofing common buildings. In the instant case, the Association maintained and improved common areas in the development. Plaintiffs, in purchasing their property,

believed that the Association would maintain the common area adjoining their property and that they would not be responsible for its upkeep. Similarly, they knew that other common areas located within the development, such as parks, gardens, and swimming pools, would continue to be maintained. The upkeep of such common areas serves the purpose of preserving the aesthetic nature of the housing development for the use and enjoyment of each association member. Because anyone living within the development may use or enjoy these services, the Association's maintenance and improvement of common areas can be utilized by a single person, members of a family, or members of a household. Thus, these services may have a personal, family, or household purpose depending upon the person or people that use it. In the instant case, the Court finds that the services funded by homeowner association fees serve all three purposes and that Plaintiffs do have a "debt" under the FDCPA. Accordingly, the Court DENIES Defendants' motion to dismiss.

IV. Conclusion

Plaintiffs are consumers that have an obligation to pay money to the Association. Because this obligation arises out of a "transaction" which is "primarily for personal, family, or household purposes," Plaintiffs owe a "debt" within the definition of the FDCPA. As such, the Court finds that the Plaintiffs have stated a claim under the FDCPA. The Court therefore DENIES Defendants' motion to dismiss under Fed.R.Civ.P. 12(b)(6).

IT IS SO ORDERED.

Supreme Court, U.S.
FILED
MAY 15 1998
OFFICE OF THE CLERK

No. 97-1666

In The

Supreme Court of the United States

October Term, 1997

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, a Florida general partnership,

Respondents.

On Petition for Writ of Certiorari to the State of Florida Fifth District Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Florida homeowners' association or Florida condominium association assessments are "debts" within the meaning of the federal Fair Debt Collection Practices Act?

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STATEMENT OF THE CASE

The Petitioners have misstated many key "facts" in their Petition for Writ of Certiorari. The Petitioners have presented serious allegations of egregious conduct supposedly perpetrated by the Respondents' law firm as "factual" proof of actual violations of the Fair Debt Collection Practices Act [hereinafter referred to as the "FDCPA"]. The petition relies upon the "factual" characterizations of these scandalous, unfounded and unproven allegations as the justification for this Honorable Court to accept jurisdiction of this cause. Petitioners' allegations of improper conduct are irrelevant, self-serving, and without support in the record. Petitioners have presented their unproven and highly refuted version of the "facts" to this Court as same are contained in their Complaint filed with the trial court. (A. 20). However, all of the material "facts" alleged by the Petitioners regarding violations of the FDCPA were, and always have been, denied by the Respondents. Respondents vehemently deny all of Petitioners' allegations that the Respondents' law firm violated the FDCPA with respect to the collection of the Petitioners' delinquent Florida homeowners' association assessments. Additionally, Respondents remain appalled by such improper, untrue, and impertinent distortions of the manner in which Respondents' law firm operates. In fact, despite no requirement to do so, Respondents' law firm endeavored to comply with the FDCPA. This Court ordinarily will not grant a Petition for Writ of Certiorari in order to review evidence and discuss specific facts. *See, e.g., United States of America v. Johnston*, 268 U.S. 220 (1925). Additionally, the Supreme Court ordinarily does not review questions of fact which are not necessary to a determination of the federal question. *E.g., Grayson v. Harris*, 267 U.S. 352 (1925).

The inclusion in the petition of such impertinent, unsubstantiated, and unproven "facts" is improper and

immaterial to a determination of the federal question presented by the Respondents in this Brief in Opposition. In the State of Florida Fifth District Court of Appeal, the Petitioners presented the following issue to the court:

> THE PLAIN ENGLISH MEANING OF "TRANSACTION" AND "PERSONAL, FAMILY OR HOUSEHOLD PURPOSES" COMPELS THE CONCLUSION THAT HOMEOWNERS' ASSOCIATION DUES AND ASSESSMENTS ARE "DEBTS" UNDER THE FDCPA AND THE FLORIDA ACT.

Yet, the Petitioners have presented the following significantly and materially different question to this Court:

> Are third party collection agents exempt from having to comply with the federal Fair Debt Collection Practices Act ("FDCPA") prohibitions against overreaching, intimidation, misrepresentation, etc. when they are attempting to collect condominium and homeowner association dues and assessments and ancillary charges, or are such items "debts" under the FDCPA?

A comparison of the issue presented to the State of Florida Fifth District Court of Appeal and the question presented to this Court clearly evidences the Petitioners' improper attempt to interject unresolved, unlitigated, and unproven factual issues into what the parties and the courts have, to this point, addressed as a question of law.

Respondents, in this Brief in Opposition, have properly identified that the federal question presented to this Court is,

and always has been, a question of law and legal interpretation. As clearly stated by the trial judge, The Honorable James C. Hauser, in his Order Granting Defendants' Motion for Summary Judgment and Motion to Dismiss dated May 7, 1996, ". . . the threshold issue is whether the collection these attorneys were trying to make was of a 'debt' within the definition of the federal and state acts." (A. 9). The State of Florida Fifth District Court of Appeal succinctly stated:

> [i]n this appeal we are asked to decide whether maintenance assessments owed to the appellants' homeowners' association are "debts" for purposes of the Fair Debt Collection Practices Act and the Florida Consumer Collection Practices Act.

(A. 1).

The trial court held in the instant case that the assessments sought to be collected are not "debts" within the meaning of the FDCPA. (A. 12). The trial court, having held that the assessments are not "debts", granted summary judgment in favor of the Respondents due to the Petitioners' failure to state a cause of action. (A. 7-13). Thereafter, Final Judgment was entered in favor of the Respondents. (A. 14-15). The State of Florida Fifth District Court of Appeal concurred with the trial court and held that Florida homeowners' association and Florida condominium association assessments are not consumer "debts" within the purview of the FDCPA. (A. 2). The Florida Supreme Court, without rendering an opinion, declined to exercise its discretionary jurisdiction to review the decision of the State of Florida Fifth District Court of Appeal. (A. 18).

This Court should be mindful that because the federal question presented by the Respondents in this Brief in

Opposition has, to this point, been addressed as a question of law, there has **never** been a trial to conclusively establish any "facts" related to the Petitioners' **allegations** of violations of the FDCPA by Respondents' law firm. Furthermore, it was held by the trial court in the instant action that Respondents' law firm is not a "debt collector" within the meaning of the FDCPA. (A. 12). Pursuant to the FDCPA, the term "debt collector"

> . . . means any person who uses any instrumentality of interstate commerce or the mails in any business the *principal purpose of which is the collection of any debts*, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. * * * The term does not include —
>
> (F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (I) is incidental *to a bona fide fiduciary obligation*. . . . [emphasis supplied] [See (A. 57-58) for complete text]

15 U.S.C.A. § 1692(e)(6).

The Seventh Circuit in the case of *Newman v. Boehm, Pearlstein & Bright*, 119 F.3d 477, 482 n.3 (7th Cir. 1997) intimated that a defense to the complaint may exist if the law firms in that case were not "debt collectors" as defined in the FDCPA. Therefore, the law firms in *Newman* may yet avoid being subject to the FDCPA. The Seventh Circuit remanded the case to the trial court for further proceedings consistent with its holding that the assessments were "debts." However, the Seventh Circuit has ostensibly left the door open for a determination of whether a law firm (such as the Respondents'

law firm in the instant action) is a "debt collector" when collecting homeowners' association and condominium association assessments.[1]

As was the case in *Newman*, if this Court determines in the instant action that Florida homeowners' association and Florida condominium association assessments are "debts" within the meaning of the FDCPA, this case would have to be remanded to the trial court for further proceedings consistent with this Court's mandate. Assumedly, this Court would not address the "debt collector" issue because there is no conflict on this issue between *Newman* and *Bryan* which would make this issue ripe for consideration by the Court.

Therefore, the worst case scenario for the Respondents would be that the instant case would be remanded for further litigation to address the legal and factual issue of whether the Respondents' law firm is a "debt collector" as defined by the FDCPA and also to determine all of the factual issues present in the instant case.

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1. *Cf.*, *Azar v. Hayter*, 874 F. Supp. 1314 (N.D. Fla. 1995), *aff'd*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 712 (1996) [holding that a corporate manager for a condominium association owed a fiduciary duty to the association to collect delinquent assessments, and therefore the corporate manager was not a "debt collector"]

REASONS FOR DENYING THE WRIT

I.

THE QUESTION PRESENTED BY THE PETITIONERS IN THEIR PETITION FOR WRIT OF CERTIORARI HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT.

Petitioners present the following question for review in their Petition for Writ of Certiorari:

> Are third party collection agents exempt from having to comply with the federal Fair Debt Collection Practices Act ("FDCPA") prohibitions against overreaching, intimidation, misrepresentation, etc. when they are attempting to collect condominium and homeowner association dues and assessments and ancillary charges, or are such items "debts" under the FDCPA?

The issue of whether the Respondents' law firm is "exempt" from the FDCPA goes directly to the question of whether the Respondents' law firm is a "debt collector" as defined in 15 U.S.C.A. § 1692a(6). (A. 57-58). As intimated by the Seventh Circuit in *Newman*, the issue of whether a law firm such as the Respondents' law firm is a "debt collector" has not been decided nor has it even been addressed by *any* of the few courts who have addressed the issue of applying the FDCPA to the collection of homeowners' association and condominium association assessments.

Importantly, the question of whether the Respondents' law firm is a "debt collector" has not been preserved below by the

Petitioners. Petitioners have never presented for review on appeal in the lower courts the question of whether the Respondents' law firm is a "debt collector."[2] This is true even though the trial court in the instant *Bryan* case specifically held that the Respondents' law firm ". . . may not be considered 'debt collectors' . . ."

The significance of the "debt collector" question cannot be underestimated. This Court should be mindful of the fact, as the Seventh Circuit recognized in *Newman*, that the question of whether homeowners' association and condominium association assessments are "debts" within the meaning of the FDCPA is **only one-half of the issue**. In fact, whether or not law firms collecting such assessments are "debt collectors" has yet to be ruled upon by any court other than the trial court in the instant *Bryan* case. For the FDCPA to apply to Respondents' law firm, the assessments sought to be collected must be "debts" *AND* the Respondents' law firm must be a "debt collector." The single issue ruled upon by the *Newman* court was whether the assessments are "debts." *Newman*, therefore, only addressed one-half of the issue. The decision in *Newman* is not in conflict with the instant *Bryan* decision because only in *Bryan* has the court held that Respondents' law firm is not a "debt collector." No other court has ruled or even analyzed the "debt collector" issue in the context of Florida homeowners' association and Florida condominium association assessments.

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2. In addition to the question presented to the State of Florida Fifth District Court of Appeal previously identified at page two (2) of this Brief in Opposition, the Petitioners presented as a second issue the following: "*The precedents relied upon by the trial court are inapplicable, distinguishable, or ill-conceived.*" These were the only two issues submitted by the Petitioners for consideration by the State of Florida Fifth District Court of Appeal.

The Court lacks subject matter jurisdiction over the instant Petition for Writ of Certiorari because there is no conflict between *Newman* and *Bryan* on the federal question of whether Respondents' law firm is a "debt collector" as defined by the FDCPA. Additionally, the "debt collector" issue has not been preserved for appeal. Lastly, because the "debt collector" issue has not been resolved nor even addressed in the prior federal cases, any opinion expressed on this issue by this Court would be purely advisory in nature.

II.

THE DECISION IN *NEWMAN* AND THE INSTANT *BRYAN* DECISION ARE NOT IN CONFLICT BECAUSE THE DECISIONS RENDERED IN THESE CASES ARE LIMITED TO THEIR RESPECTIVE FACTS.

In the State of Florida, homeowners' associations and condominium associations are creatures of statute.[3] The purpose of and the uses to which "assessments" may be spent are strictly limited by the Florida Statutes and the governing documents creating the association. In reaching its decision in the instant *Bryan* case, the State of Florida Fifth District Court of Appeal necessarily interpreted the FDCPA definition of "debt" and "personal, family, and household purposes" within the confines of the Florida Law.

In the case of *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), the Seventh Circuit expressly examined Illinois law in reaching its conclusions that, in Illinois,

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3. In Florida, homeowners' associations are governed generally by Chapter 617, Fla. Stat., and are specifically governed by §§ 617.301-617.312, Fla. Stat. (*i.e.* the "Florida Homeowners' Association Act"). Condominiums are governed by Chapter 718, Florida Statutes (*i.e.* the "Florida Condominium Act.")

homeowners' association and condominium association assessments are debts under the FDCPA. *Id.* at 481. Specifically, the Seventh Circuit stated:

> . . . the Riters became bound by the Declaration of Covenants, Conditions, and Restrictions of their homeowners association, which required the payment of regular and special assessments imposed by the association. The Newmans similarly became obligated upon the purchase of their condominium unit to pay any assessments pursuant to the condominium ownership declaration and the by-laws of their association, **as well as under an Illinois statute addressed to condominium property.**

(Emphasis supplied.) *Newman*, 119 F.3d at 481.

As previously stated, homeowners' associations and condominium associations in Florida are creatures of statute. In Illinois, ostensibly, only condominium associations in Florida are statutorily governed. Furthermore, there is a very strong likelihood that the governing documents of the homeowners' association in the instant *Bryan* case and the governing documents for the associations in the *Newman* case are vastly different.

Therefore, because the Laws of Florida and the Laws of Illinois may differ on the use and purposes of assessments, and because the specific governing documents of the associations in *Bryan* and *Newman* are not identical, and may not even be similar, the decisions in *Bryan* and *Newman* should be limited to their specific facts and their specific jurisdictions. As such, there is no conflict between the *Bryan* decision and the *Newman* decision which vests jurisdiction over this Petition for Writ of Certiorari with this Court.

III.

THE JUDGMENT ENTERED BY THE STATE OF FLORIDA FIFTH DISTRICT COURT OF APPEAL WAS NOT IN CONFLICT WITH *NEWMAN* WHEN IT WAS "RENDERED" PURSUANT TO STATE LAW.

The State of Florida Fifth District Court of Appeal issued its written opinion holding in favor of the Respondents on May 9, 1997. (A. 1). After the entry of this written opinion, the Petitioners filed with the State of Florida Fifth District Court of Appeal their Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief. This motion for rehearing was denied by Order of the Court dated June 25, 1997. (A. 17). Therefore, as of June 25, 1997, the judgment was "final" for the purposes of appeal to the Florida Supreme Court. The State of Florida Fifth District Court of Appeal was left with only the ministerial act of issuing its mandate in order to conclude the case. *See Board of Commissioners v. Lucas*, 93 U.S. 108 (1876).

A judgment is "rendered", pursuant to the Florida Rules of Appellate Procedure, when the signed, written order is filed with the Clerk.[4] However, rendition of the judgment is stayed pending the disposition of a timely filed motion for rehearing. Therefore, in the instant cause, the judgment of the State of Florida Fifth District Court of Appeal was "rendered" on June 25, 1997, upon the entry of the Order of the Court denying Petitioners' Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief.[5] (A. 17).

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4. Rule 9.010(h), Fla. R. App. Pr.

5. *Cf. Eldred v. Reber*, 639 So. 2d 1086 (Fla. 5th DCA 1994) [holding that a statute of limitations begins to run from the date the appellate court "renders" its decision rather than from the date the appellate court issues its mandate].

It is well settled law in Florida that appellate courts are to apply the law as it exists at the time the appellate decision is rendered. *E.g., Lowe v. Price*, 437 So. 2d 142 (Fla. 1983). In reaching its decision in the instant cause, the State of Florida Fifth District Court of Appeal cited to an unbroken line of federal decisions which held that homeowners' association and condominium association assessments are not "debts" within the meaning of the FDCPA. (A. 2).

The Petitioners urge this Court to accept jurisdiction based upon an alleged conflict between the instant *Bryan* decision rendered by the State of Florida Fifth District Court of Appeal and the case of *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997). However, the "judgment" in *Newman* was not "entered" until July 2, 1997, which date is **after** final rendition of the *Bryan* judgment.[6] Furthermore, the judgment in *Newman* was not final for the purposes of the issuance of a mandate until the motion for rehearing in that case was denied by the Seventh Circuit on September 12, 1997.[7]

The State of Florida Fifth District Court of Appeal decision was "final" for purposes of appeal to this Court on June 25, 1997. *See, e.g., Market Street R. Co. v. Railroad Commission*, 324 U.S. 439 (1945). The decision by the *Newman* court was not "final" until September 12, 1997. Accordingly, the Seventh Circuit's decision in *Newman* is not in "conflict" with the instant decision in *Bryan* due to the fact that the *Bryan* decision was, by state law, **rendered** and final **prior** to the Seventh Circuit's decision in *Newman*.

Therefore, the State of Florida Fifth District Court of Appeal has not ". . . decided an important federal question in a way

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6. Rule 36, Federal Rules of Appellate Procedure.

7. Rules 40 and 41, Federal Rules of Appellate Procedure.

that conflicts with the decision of another state court of last resort or of a United States court of appeals."[8] This is true because at the time the *Bryan* decision was rendered pursuant to state law, the decision in *Newman* was not final pursuant to the Federal Rules of Appellate Procedure.

Additionally, this Court should reject certiorari review because a resolution of the alleged conflict would be a retroactive application of the law to the decision in *Bryan* because the *Bryan* decision was final pursuant to state law prior to the judgment in *Newman*. Therefore, because the instant *Bryan* decision is "rendered" and "final" pursuant to applicable state law, acceptance of the Petition for Writ of Certiorari and the subsequent rendition of a decision by this Court would be purely advisory in nature and would not alter or amend the result reached by the Florida State Courts.

IV.

THE PETITION FOR WRIT OF CERTIORARI FILED HEREIN IS UNTIMELY.

As previously argued in this Brief in Opposition, the decision of the State of Florida Fifth District Court of Appeal was "rendered" on June 25, 1997, the date when the State of Florida Fifth District Court of Appeal entered its Order of the Court denying Petitioners' Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief. (A. 17). Petitioners' Motion to Stay or Recall Mandate is not an authorized motion which tolls rendition of the judgment.[9]

8. Rule 10(b), Rules of the Supreme Court of the United States.

9. The commentary to Rule 9.020, Fla. R. App. Pr., states that "[m]otions that postpone the date of rendition have been narrowly limited to prevent deliberate delaying tactics. To postpone rendition the motion must be timely, authorized, and one of those listed." A motion to stay or recall mandate is not listed as an "authorized motion" which would toll rendition of the judgment.

Petitioners Motion to Stay or Recall Mandate postponed only the ministerial act of the issuance of the court's mandate, not the rendition of the judgment. If nothing more than a ministerial act remains to be done, the decree is regarded as concluding the case and is immediately reviewable by the Court. *Republic Natural Gas Co. v. State of Oklahoma*, 334 U.S. 62 (1948).

The Respondents argued in their Brief on Jurisdiction filed with the Florida Supreme Court that the Petition for Discretionary Review was untimely filed more than thirty days after a rendition of the judgment. Therefore, the Florida Supreme Court may very well have based its denial of the Petition for Discretionary Review on state law timeliness grounds. When the highest court of the state delivers no opinion and it appears that the judgment might have rested upon non-federal grounds, the Court ordinarily will not accept certiorari jurisdiction. *Stembridge v. State of Georgia*, 343 U.S. 541 (1952).

As a prerequisite to granting the instant Petition for Writ of Certiorari, this Court should seek a ruling or clarification from the Florida Supreme Court to determine, under state law, whether or not a motion to stay or recall mandate is an "authorized motion" which would toll the time period for seeking discretionary review. If a motion to stay or recall mandate does not toll the time period for seeking discretionary review, then the instant Petition is untimely and this Court lacks subject matter jurisdiction.[10]

The decision of the State of Florida Fifth District Court of Appeal was rendered on June 25, 1997. The instant Petition for Writ of Certiorari was untimely filed more than ninety (90) days after a rendition of the judgment of the State of Florida Fifth District Court of Appeal.

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10. Rule 12, Rules of the Supreme Court of the United States.

V.

THE ISSUE PRESENTED IN THIS CAUSE IS NOT SUFFICIENTLY RIPE FOR REVIEW BY THE COURT.

The Petitioners have noted that

> [t]o date, *Newman* is the first federal appellate court (and only the second appellate court anywhere, *Bryan* being the first) to expressly construe the FDCPA in the context of dues and assessments for community associations.

(Pet. 8-9). As noted by the State of Florida Fifth District Court of Appeal, the FDCPA ". . . has no plain meaning and its intent is anything but clear." (A. 2).

This Court should await further clarification and/or interpretation from other courts of appeal in order that this Court should benefit from a variety of views, rather than only the two views presented by *Newman* and *Bryan*. Furthermore, the resolution of the federal question presented by the Respondents in this Brief in Opposition should be accomplished legislatively rather than judicially. In fact, according to the March 1998 issue of the Community Associations Institute **Capitol Connection** Newsletter of the Government & Public Affairs Department, the Community Associations Institute [hereinafter referred to as "CAI"] has drafted legislative amendments to the FDCPA in order to clarify the federal question presented by the Respondents in this Brief in Opposition. The proposed CAI legislation would exempt homeowners' association assessments and condominium association assessments from the purview of the FDCPA. As stated in the newsletter, CAI is currently meeting with members of the United States House and Senate Banking Committees to

solicit support for the amendments proposed by CAI. This Court should await further developments in the case law or additional legislative clarification prior to judicially legislating the federal question presented herein.

The previously unbroken line of cases which have squarely addressed the federal question presented herein, and upon which the *Bryan* court relied, dates all the way back to *Archer v. Beasley*, No. 90-2576 (CSF), 1991 WL 34889 (D.N.J. March 5, 1991). The Seventh Circuit in *Newman* was the first court to reject this unbroken line of federal cases which arose from *Archer*. Until *Newman*, Congress had no federal question to legislatively clarify because there was no disparity in the judicial interpretation given to the federal question presented in the instant cause. Only now, after *Newman*, is there a need for Congressional involvement to clarify the federal question. This Court should await the anticipated legislative reaction to *Newman* prior to judicially legislating a resolution of the federal question presented in the instant cause.

CONCLUSION

This case does not merit review by the Court. For the foregoing reasons, the Court should deny the Bryans' Petition for Writ of Certiorari.

Respectfully submitted,

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MOTION FILED

MAY 15 1998

(3)

No. 97-1666

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KEVIN E. BRYAN and RENEE M. BRYAN,
Petitioners,

v.

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CLAYTON & McCULLOUGH, a Florida general partnership,
Respondents.

On Petition for Writ of Certiorari To The State of Florida Fifth District Court of Appeal

MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* AND BRIEF OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* OF THE AMERICAN ASSOCIATION OF RETIRED PERSONS, THE NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, AND THE CONSUMER FEDERATION OF AMERICA IN SUPPORT OF PETITIONERS

The American Association of Retired Persons (AARP), the National Association of Consumer Advocates (NACA), the National Consumer Law Center (the Center), and the Consumer Federation of America (CFA), respectfully move for leave to file the accompanying brief as *amici curiae* in support of the Bryans' Petition for a Writ of *Certiorari* from the judgment of the Florida Fifth District Court of Appeal.

Pursuant to Supreme Court Rule 37.2, consent of the parties to the filing of the brief was sought through counsel. Counsel for Petitioners gave consent, but counsel for Respondents declined to do so.

STATEMENT OF INTEREST OF *AMICI CURIAE*

The American Association of Retired Persons (AARP) is a non-profit membership organization of persons aged 50 and older, approximately 2.3 million of whom live in Florida. As the largest membership organization serving older Americans, AARP supports effective consumer protection at the federal, state, and local levels to safeguard consumers against fraud, deception, and unfair practices. AARP also recognizes the importance of a consumer's ability to challenge violations of these laws and encourages consumer participation in the judicial process to pursue these challenges. AARP supports vigorous enforcement of the Fair Debt Collection Practices Act (FDCPA), and other federal consumer credit acts, including the Equal Credit Opportunity Act, the Fair Credit Billing Act, and the Fair Credit Reporting Act.

The National Association of Consumer Advocates (NACA) is a non-profit corporation whose members are private and public sector attorneys, legal services attorneys, and law professors and students whose primary practice or area of study involves the protection and representation of consumers. Its mission is to promote justice for all consumers by maintaining a forum for information-sharing among consumer advocates across the country, and to serve as a voice for its members as well as consumers in the ongoing struggle to curb unfair and abusive business practices.

Prevention of debt collection abuse has been a continuing focus of NACA since its inception. Protection of the unsophisticated consumers for whose benefit Congress adopted the FDCPA is NACA's ultimate goal, both within the debt collection field as well as the larger arena of the consumer rights movement. To that end, NACA has appeared as an *amicus curiae* before this Court on several occasions, including in its only FDCPA case to date, *Heintz v. Jenkins*, 514 U.S. 291 (1995) (joined by *amici* AARP and the National Consumer Law Center).

The National Consumer Law Center, Inc. (the Center) is a non-profit corporation established in 1969 to carry out research, education, and litigation regarding significant consumer law issues. The Center has as one of its primary objectives the provision of assistance to attorneys in advancing the interests of their low-income clients in the area of consumer law.

The Center's activities have included research and providing expertise on consumer law for legal services and private attorneys, the Congress of the United States, state legislatures, and state and local offices charged with the enforcement of consumer protection acts; participation as counsel, co-counsel and *amicus curiae* throughout the country; and sponsorship of and participation in conferences designed to provide continuing education for legal services

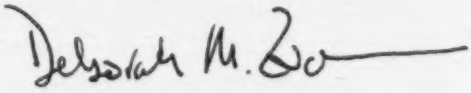
and private attorneys. The FDCPA is a major focus of the Center's work. The Center publishes Fair Debt Collection (2d ed. 1989 & 1994 Supp.), a treatise of more than 800 pages, to assist attorneys who deal with consumer debt collection problems. In addition, the Center has directly assisted attorneys in scores of cases arising under the FDCPA. The Center was active in the passage of the FDCPA, testifying at hearings and frequently conferring with counsel to the Subcommittee on Consumer Affairs of the Senate Committee on Banking, Housing and Urban Affairs. Many provisions of the Center's Model Consumer Credit Code were used in the FDCPA. The Center's article on attorney coverage under the FDCPA was cited as authoritative in *Crossley v. Lieberman*, 868 F.2d 566 (3d Cir. 1989).

The Consumer Federation of America (CFA) is a non-profit association founded in 1968 to advance the interests of consumers through advocacy and education. CFA's membership is comprised of approximately 240 national, state, and local consumer groups which, in turn, represent more than 50 million consumers. CFA participates in various forums aimed at securing and preserving adequate legal remedies for consumers, including redress under the FDCPA.

The interest of *amici* in this case stems from their positions as among the leading and most active consumer organizations in this country and their particular involvement, past and present, in matters concerning enforcement of the FDCPA. *Amici* respectfully suggest that it will be useful to the Court,

in reviewing the Petition for Writ of *Certiorari*, to consider their views about the importance of resolving the split in authority created by the Florida appellate court's ruling.

Respectfully submitted,



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May 15, 1998

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1/]

The interest of *amici* is set forth in the preceding Motion for Leave to File this brief.

REASONS FOR GRANTING THE WRIT

When it enacted the Fair Debt Collection Practices Act (FDCPA, or, the Act), 15 U.S.C.A. §§ 1692-1692o (West 1998), Congress found "abundant evidence of the use of abusive, deceptive and unfair debt collection practices by many debt collectors." § 1692(a). The detailed allegations of Respondents' misrepresentations, debt padding, imposition of illusory and illegal additional charges, and extortionate collection practices show that such tactics still are being used twenty years later. The sole issue presented now is whether this misconduct is excused, not because of any claim of innocence, but because of the FDCPA's purported lack of coverage.

Congress intended that "every individual, whether or not he owes the debt, has a right to be treated in a reasonable and civil manner." *Baker v. G.C. Servs. Corp.*, 677 F.2d 775, 777 (9th Cir. 1982) (citation and quotations omitted); *see also Heintz v. Jenkins*, 514 U.S. 291, 292-93 (1995). Congress expressly added the FDCPA to the Consumer Credit Protection Act (CCPA) because of the inadequacy of existing remedies for redressing the substantial injuries to consumers caused by these unsavory practices, as well as the competitive disadvantage suffered by honest and ethical debt collectors. § 1692(a), (b) and (e).

The decision below, *Bryan v. Clayton*, 698 So. 2d 1236 (Fla. Dist. Ct. App. 1997), places citizens of the State of

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[1/] No counsel for any party authored any portion of this brief. No person or entity other than *amici*, their members, or their counsel has made a monetary contribution to the preparation and submission of this brief.

Florida in a unique position as the only consumers in the country who are not afforded the protections intended by Congress under the circumstances of this case. Relying on now-discredited *dictum* from an early Third Circuit FDCPA decision, and on federal district court decisions which adopted that *dictum* without analysis, and apparently with no awareness of its fatal flaw, the court below held that collection of condominium and homeowner association dues and assessments falls outside the Act's intentionally broad definition of a "debt" subject to its coverage. § 1692(a)(5). Five federal Courts of Appeal have rejected that *dictum*, and no federal Court of Appeal has adopted it. Accordingly, *amici* urge this Court to grant a writ of *certiorari* in order to restore uniformity of interpretation and application of the FDCPA.

I. THE LOWER COURT'S EXPLICIT REFUSAL TO APPLY THE PLAIN LANGUAGE OF THE ACT IS ERRONEOUS AND EXPLAINS ITS DEPARTURE FROM THE UNANIMOUS TEACHING OF THE FEDERAL COURTS OF APPEAL.

The lower court expressly refused to apply the plain language of the Act's definition of a covered "debt." *Bryan*, 698 So. 2d at 1237. This Court has consistently held that the plain language textual analysis is mandatory and dispositive. *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993); *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475 (1992); *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989). Indeed, in its only FDCPA decision to date, this Court unanimously resolved a similar coverage issue created by an identical lop-sided split of lower appellate court authority on the basis of the "ordinary English" meaning of a defined term. *Heintz*, 514 U.S. at 294. The lower court's jurisprudential error is patent.

Had it examined the statutory definition, the lower court would have had to agree with the compelling analysis of *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997), and to reach the same conclusion as the Seventh Circuit that a "debt" under the FDCPA contains no underlying credit requirement. Five federal Courts of Appeal, all within the last year, have rejected the *dictum* in *Zimmerman v. HBO Affiliate Group*, 834 F.2d 1163, 1168 (3d Cir. 1987), relied on by the court below, that

> the type of transaction which may give rise to a 'debt' as defined in the FDCPA, is the same type of transaction as is dealt with in all other subchapters of the Consumer Credit Protection Act, *i.e.*, one involving the offer or extension of credit to a consumer.

Each Court examined the plain language of the FDCPA and found no support for that *dictum*.[2/]

No federal court which has examined *Zimmerman* or which has performed any analysis has found it persuasive or adopted it. The earlier district court cases which held that the FDCPA requires a credit transaction merely parroted its *dictum*. The decision presented here stands alone as the only appellate case, albeit from a state appellate court, and the only

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[2/] In addition to the Seventh, Ninth, and Eleventh Circuit decisions cited by Petitioners, *Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997); *Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir.), *cert. denied*, 118 S. Ct. 298 (1997); *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997); *Charles v. Lundgren & Assocs.*, 119 F.3d 739 (9th Cir.), *cert. denied sub nom. Checkrite Ltd. v. Charles*, 118 S. Ct. 627 (1997); and *Brown v. Budget Rent-A-Car Systs., Inc.*, 119 F.3d 922 (11th Cir. 1997), the Eighth and Tenth Circuits recently joined this unbroken line of Circuit Courts in rejecting the *Zimmerman dictum*. *See Duffy v. Landberg*, 133 F.3d 1120 (8th Cir. 1998); *Snow v. Riddle*, 1998 WL 233383 (10th Cir. May 11, 1998).

case decided in the last year having the benefit of *Bass* and its progeny, to adhere to the now-discredited credit requirement that has no support in the statutory language. The Florida judiciary's divergence from the uniform holdings of the federal Courts of Appeal merits the attention of this Court and meets the exacting standard for granting a writ of *certiorari* established by Rule 10 of this Court.

II. THE LOWER COURT'S ALTERNATIVE HOLDING AS TO THE ABSENCE OF A CONSUMER PURPOSE IS INSUPPORTABLE.

The lower court's alternative holding that the obligation to pay fees associated with maintaining Petitioners' residence does not arise "primarily for personal, family, or household purposes," § 1692a(5), is spurious. First, and most importantly for establishing the split of authority necessary to grant a writ of *certiorari*, this holding is diametrically opposed to the holding of the Seventh Circuit in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. 1997), as incisively discussed by Petitioners. (Pet., § I, at 7-14.) The lower court's summary rejection "of the decision of the learned panel of the federal appeals court," *Bryan*, 698 So. 2d at 1237, is fundamentally insupportable.

In addition, the court's stark refusal to apply the consumer purpose standard to the prototypical consumer aspiration of home ownership necessarily rejects much of the CCPA, throughout which the "personal, family, or household purposes" language is a recurring theme, *see* Truth in Lending Act (TILA), 15 U.S.C.A. § 1602(h) (West 1998), Consumer Leasing Act, 15 U.S.C.A. § 1667(1) (West 1998), and Credit Repair Organizations Act, 15 U.S.C.A. § 1679a(2) (West 1998), as well as other federal consumer protection laws employing the same criterion. *See, e.g.*, Magnuson-Moss Warranty Act, 15 U.S.C.A. § 2301(1) (West 1998). This consumer purpose language distinguishes such personal, family, and household uses from commercial and

agricultural purposes. *First Gibraltar Bank, FSB v. Smith*, 62 F.3d 133, 135-36 (5th Cir. 1995) (FDCPA); *Bloom v. I.C. Syst., Inc.*, 972 F.2d 1067, 1068-69 (9th Cir. 1992) (FDCPA); *Munk v. Federal Land Bank*, 791 F.2d 130, 131-32 (10th Cir. 1986) (*per curiam*) (FDCPA). Indeed, within the range of transactions generally dealing with consumer purposes, Congress has granted special rights and protections when a person's residence is at stake. *See* 15 U.S.C.A. §§ 1635, 1639 (West 1998). Home ownership is the quintessential consumer purpose, and the lower court's treatment of this question is indefensible.

This Court stated eighteen years ago, in the context of the CCPA, that the judiciary is ill-equipped to substitute its judgment through statutory interpretation for the legislative decisions made by Congress: "[J]udges are not accredited to supersede Congress or the appropriate agency by embellishing upon the regulatory scheme." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980) (TILA). The danger of such judicial activism is illustrated here, where the court below departed from the statutory language and the canons of statutory construction to reach a conclusion replacing the judgment of Congress with its view of how the FDCPA (and necessarily the remainder of the CCPA) should operate. The holding that home ownership is not a consumer purpose (as well as imposing the condition that a "debt" is limited to credit obligations) highlights one of the practical reasons that this Court warned in *Milhollin* against creative judicial statutory interpretation. The lower court's view of the Act was necessarily limited to the claim before it. Therefore, it did not consider, let alone evaluate, the adverse impact that its erroneous departure from the statutory language would have on the interdependent provisions of other titles of the CCPA.

III. THE DECISION BELOW NECESSARILY WILL PROMOTE FORUM SHOPPING TO AVOID ITS RESTRICTIVE HOLDING.

Congress granted concurrent jurisdiction to federal and state courts to enforce the FDCPA. § 1692k(d). The natural effect of the decision below, however, will be to discourage plaintiffs from filing any further FDCPA suits in the Florida state courts where the scope of the definition of a "debt" might be at issue. This result is particularly likely since the Eleventh Circuit, which includes Florida within its jurisdiction, is one of the five federal Courts of Appeal which have authoritatively rejected the state court's credit-based rationale, *Brown v. Budget Rent-A-Car Systs., Inc.*, 119 F.3d 922 (11th Cir. 1997), and, as all other federal courts have done, recognizes home ownership as a consumer purpose. *Tower v. Moss*, 625 F.2d 1161, 1165-67 (5th Cir. 1980) (TILA).[3/]

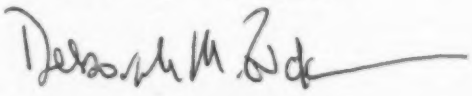
This Court has described as "mischievous" the ability to vary the outcome of a case through forum selection." *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938). However, it will be difficult to fault Florida consumers and their attorneys for engaging in such forum shopping in view of the current rift between the Florida judiciary and the Eleventh Circuit on this matter of federal statutory interpretation. The solution is the one contemplated by the Supremacy Clause of the Constitution: the exercise by this Court of its *certiorari* authority to bring this state decision into conformity with federal case law.

[3/] Decisions of the former Fifth Circuit decided before October 1, 1981 are binding as precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

CONCLUSION

Amici respectfully urge this Court to grant the writ of *certiorari* to correct this misguided result and to resolve the split of authority between the Florida court and the federal Circuits on this important question of national policy and federal statutory construction.

Respectfully submitted,



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May 15, 1998

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OFFICE OF THE CLERK

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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PREFACE

As in their petition for writ of *certiorari,* the petitioners are referred to herein as "the homeowners" or "the Bryans," and the respondents are referred to herein as "the law firm." The appendix to this reply brief is cited as "[Reply App. at ___]" to contrast it with the appendix to the homeowners' petition for writ of *certiorari,* which was cited therein as "[APX. at ___]" and is accordingly cited herein as "[Petition APX. at ___]."

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REPLY TO LAW FIRM'S STATEMENT OF THE CASE

The law firm's brief in opposition contends the homeowners misstated many key facts in their petition for writ of *certiorari*. However, the law firm fails to specify, or even allude, to any examples, or to address the fact that its own correspondence (set forth in the appendix to the homeowners' petition as exhibits to the complaint) provides or substantiates most of the factual allegations of the petition. Instead, the law firm merely asserts: "scandalous, unfounded, and unproven" [Brief in Opposition at 1] in attempting to discredit the petition for writ of *certiorari*.

The law firm also overlooks that on review of summary judgment, in accordance with elementary principles of civil and appellate procedure, the appellate courts necessarily regard all pleadings and evidence in the light most favorable to the non-moving party, just as the trial court was obliged to do.

The law firm further contends [Brief in Opposition at 2] that the homeowners have posed a different issue here than in the state appellate courts. However, the homeowners merely framed the federal question in the disjunctive. This was done in order to succinctly give context, structure and consequences to the issue – *i.e.*, if community association dues and assessments and ancillary charges are held *not* to be "debts" under the FDCPA, then the unavoidable consequence will be that third party collection agents are exempt from having to comply with

the FDCPA's prohibitions against overreaching, intimidation, misrepresentation, etc., when attempting to collect these obligations.

The law firm obfuscates the foregoing by appearing to suggest that the homeowners are seeking a determination by this Court that the law firm is a "debt collector" as defined under the FDCPA, and that such determination was either not preserved or else should instead be made on remand, as a mixed matter of law and fact. [Brief in Opposition at 4-5]. The homeowners concur that the issue of "debt collector" *vel non* must await remand – necessarily, one cannot later be found to be a "debt collector" unless one is first determined to be collecting a "debt" – and the meaning of "debt" is precisely what is presently before this Court. Thus, in framing the question presented herein, the homeowners carefully referred to the law firm and to others similarly situated as "third party collection agents" rather than "debt collectors." [Petition for Writ of *Certiorari* at *i*]. Although the homeowners expressly pled in ¶ 15 of their complaint that the law firm is a "debt collector" as defined by the FDCPA [Petition APX. at 22], they recognize they will need to prove the allegation on remand – once the controversy over the meaning of "debt" is adjudicated by this Court.

REPLY TO LAW FIRM'S REASONS FOR DENYING THE WRIT

I. The issue on review is whether community association dues, etc., are "debts," not whether the law firm is a "debt collector."

As discussed *supra*, the law firm has misread or misstated the issue herein. The law firm is likewise in error when it claims [Brief in Opposition at 6] that none of the few courts which have considered the issue of applying the FDCPA to dues or assessments has considered whether a law firm was a "debt collector." To the contrary, the district court in *Nance v. Petty, Livingston, Dawson & Devening*, 881 F. Supp. 223 (W.D. Va. 1994) expressly considered this issue. *Nance* ruled, as an alternative holding to its perplexing reliance on *Mabe v. G.C. Services, Ltd.*, 32 F.3d 86, 88 (4th Cir. 1994) (involving past due child support), that as a matter of law, a law firm whose collection activities only comprised approximately 1% of its caseload could not be a "debt collector" with respect to homeowner association assessments for repair and maintenance of a private road to the subdivision. *Sub judice*, it should be fairly self-evident that before calculating the percentage of a law firm's practice devoted to "debt collection," one must first determine what constitutes a "debt" – which is precisely the question presented herein.

Finally, the law firm purports to quote the trial court herein as holding that the law firm was not a "debt collector." [Brief in Opposition at 7]. However, in quoting

the trial court, the law firm failed to include the following, italicized, explanatory portion of the trial court's opinion:

> Clayton, McCulloh and Clayton & McCulloh may not be considered 'debt collectors' *because under the reasoning of the cases discussed above, the amounts those defendants attempted to collect were not 'debts' under the federal or state acts. As such, no claim for relief may be stated against these defendants under either act in the instant case.* [emphasis added]

[Petition APX. at 12].

II. The law firm's attempt to limit *Newman* and *Bryan* is inconsistent with those cases, with the cases they cite, and with the FDCPA.

The law firm's attempt to distinguish *Newman* and *Bryan* as dependent on state law is a red herring. Neither opinion states or fairly implies that its result was dependent on or influenced by the uniqueness of the corporate law, condominium law or homeowner association law of the forum state, nor do any of the authorities cited by *Newman* or *Bryan* so suggest. Rather, all of the opinions recognize that the homeowner or condominium owner is obliged by contractual or recorded restrictive covenants or by a declaration of condominium to pay dues and assessments. As relevant here, whether such obligation is enforceable by common law or statutory law is a distinction without a difference, and the law firm's attempt to inject mere speculation into this non-issue should be seen for what it is. Under the law firm's perspective, the

concepts of *stare decisis* and precedent would be empty phrases.

Finally, the law firm's balloon of speculation on unique state law is further punctured by the FDCPA itself, which provides that:

> It is the purpose of this subchapter . . . to promote consistent State action to protect consumers against debt collection abuses.

15 U.S.C. § 1692(e) [Petition APX. at 56].

III. & IV. The law firm's arguments on rendition, untimeliness and jurisdiction were previously argued to and implicitly rejected by the Florida Fifth District Court of Appeal and by the Florida Supreme Court.

As this Court recognized in *Florida Star v. B.J.F.*, 484 U.S. 984 (1987), the appellate jurisdiction of Florida state courts is a matter of Florida law in the first instance. Thus, where a Florida appellate court determines it has appellate jurisdiction, such finding of jurisdiction under state law will be honored by this Court. *Id.*

The foregoing is significant because the law firm's arguments III and IV attempt to re-litigate here virtually the identical jurisdictional objections it unsuccessfully asserted to the Florida Fifth District Court of Appeal [Reply App. at 7-15] and to the Florida Supreme Court [Reply App. at 28-41].[1] For example, the law firm's

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[1] The homeowners' motion to the Florida Fifth District Court of Appeal to stay or recall mandate and the homeowners'

response to the Florida Fifth District Court of Appeal on the homeowners' motion to stay or recall the mandate urged that:

> . . . Therefore, the jurisdiction of this court to recall and/or reconsider that judgment ended on July 7, 1997.

[Reply App. at 14, ¶ 32]. Rejecting such coaxing, the Florida Fifth District Court of Appeal labored with the homeowners' motion for almost two months, culminating in its order of September 12, 1997 denying the motion to stay or recall ***on the merits***, not on the jurisdictional challenge.

Undaunted, the law firm's brief on jurisdiction to the Florida Supreme Court also denied the latter court had jurisdiction, claiming, *inter alia*:

> The Bryans' notice to invoke the discretionary jurisdiction of the Florida Supreme Court . . . was ***not timely*** filed pursuant to law and the rules of appellate procedure. [emphasis in original].

[Reply App. at 32]. Accordingly, the law firm concluded by urging that the Florida Supreme Court:

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brief on jurisdiction to the Florida Supreme Court are also furnished in the appendix hereto [Reply App. at 1-6, 16-27, respectively] out of an abundance of precaution – not to re-argue the state jurisdictional issues, but simply to provide an evidentiary record that the jurisdictional issues were fully explored by both litigants in the state appellate courts after the June 25, 1997 order denying rehearing.

> [S]hould summarily reject jurisdiction and *dismiss* the instant notice to invoke discretionary jurisdiction. [emphasis added]

[Reply App. at 41]. Notwithstanding the urging of the law firm, the Florida Supreme Court elected ***not*** to dismiss the petition, nor did it find it lacked jurisdiction, but instead merely "decline[d] to accept jurisdiction," [Petition APX. at 18], and chose to deny discretionary review. [*Id.*] *Cf. Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988). The difference is subtle but significant. Had the Florida Supreme Court deemed itself to be without jurisdiction, a *dismissal* of the petition for review would have been appropriate, as requested by the law firm, rather than *denial* of the petition for review. *See, e.g., Florida v. Walker*, 593 So.2d 1049, 1050 (Fla. 1992), and discussion in *Parkway Bank v. Fort Myers Armature Works, Inc.*, 658 So.2d 646, 648-49 (Fla. 2d DCA 1995). *See also* Illustrative Table of Florida Decisions Without Published Opinions at 705 So.2d 7 (Fla. 1997), and *compare, e.g., Brown v. Pezzi*, 705 So.2d 7 (Fla. 1997) (review denied) *with Adams v. Lockheed Martin*, 705 So.2d 7 (Fla. 1997) (review dismissed).

Finally, the law firm ignores that it is principally the fifth district's order of September 12, 1997 that is on review herein, and not its order of June 25, 1997. It was not until September 12 that said court refused to yield to *Newman* and afforded the homeowners a basis to seek discretionary review by the Florida Supreme Court and ultimately by this Court.

V. Ripeness is in the eyes of the beholder.

The homeowners recognize this Court generally prefers more than two appellate opinions on an issue before accepting *certiorari* jurisdiction. However, competing considerations surely exist here. There have been multiple federal district court opinions on the specific issue in a fairly short time span. This suggests that the abuses addressed by the FDCPA appear to exist frequently in the context of collection efforts for community associations. Yet, the amount involved in these controversies, combined with the potential dire consequences to a homeowner or condominium owner if ultimately unsuccessful, are likely to have a chilling effect on the number of appeals in any forum. Moreover, a denial of *certiorari* will most likely disenfranchise other similarly situated citizens of the nation's fourth most populous state from ever utilizing the state court system to enforce the FDCPA,[2] and even though Congress granted concurrent jurisdiction for its enforcement to both the federal and state courts. 15 U.S.C. § 1692k(d).

The law firm has further urged this Court to decline jurisdiction on the basis it should wait and see what

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[2] Florida has five intermediate district courts of appeal, arranged geographically. Section 35.01, *Fla. Stat.* (1997). All state trial courts in Florida are compelled to follow *Bryan*, regardless of their location, unless and until there is a conflicting decision directly on point from that trial court's district court of appeal. *See, e.g., Pardo v. Florida*, 596 So.2d 665, 666-67 (Fla. 1992). Accordingly, absent *certiorari*, it is unlikely a subsequent Florida plaintiff will be daring enough to challenge the holding of *Bryan* in state court, knowing that an appeal will be essential in order to attempt to avoid the holding in *Bryan*.

Congress does in future legislative sessions. Yet, there is no good reason to do so. The potential for new legislation, the content thereof and its timing are pure speculation, whereas the present law is clear. This Court was likewise clear in *Heintz v. Jenkins*, 514 U.S. 291, 297-98 (1995) that express manifestations of congressional intent should be enforced and not thwarted.

Although the homeowners are not so bold as to urge summary reversal, they do submit that the conflict is sufficiently crystallized presently, and an indefinite delay in its resolution would be sufficiently injurious to the public interest that a denial of *certiorari* would manifest itself in the adage that "justice delayed is justice denied."

CONCLUSION

For the reasons stated above and in the homeowners' petition, this Court should accept jurisdiction and enforce the FDCPA as plainly meant, written, and intended. The Petition for Writ of *Certiorari* should be granted.

Respectfully submitted,

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IN THE STATE OF FLORIDA
FIFTH DISTRICT COURT OF APPEAL

5 DCA CASE NO. 96-2406
L.T. CASE NO. CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN,

Plaintiffs/Appellants,

vs.

KENNETH M. CLAYTON and NEAL MCCULLOH individually and doing business as CLAYTON & MCCULLOH, a Florida general partnership,

Defendants/Appellees,

and vs.

AMBER RIDGE HOMEOWNERS' ASSOCIATION, INC., a Florida corporation,

Defendant.

BRYANS' MOTION TO STAY OR RECALL MANDATE, AND NOTICE OF SUPPLEMENTAL AUTHORITY

The appellants, KEVIN E. BRYAN and RENEE M. BRYAN, pursuant to Fla. R. App. P. 9.300 and 9.210(g) file this motion to stay or recall mandate, and notice of supplemental authority, and say:

Background

1. This court issued its decision affirming the lower court on May 9, 1997. On May 27, 1997, the Bryans timely filed a motion for clarification, rehearing, rehearing *en banc*, and certification, and for ancillary relief, which was denied by order dated June 25, 1997.

2. Accordingly, under Fla. R. App. P. 9.340(b), this court's mandate is due to be issued fifteen days after June 25, 1997, or on July 10, 1997. However, for reasons set forth below, the Bryans urge that this court should stay the issuance of said mandate and withdraw its opinion, or recall the mandate if it has already been issued by the time this court reviews the instant motion.

Basis for Motion

3. This court's opinion of May 9, 1997 was expressly based upon five federal district court decisions, the latest of which was *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D. Ill. 1996).

4. However, on July 2, 1997, *Riter* was reversed, and all of the precedential authorities cited by this court were expressly repudiated by the United States Court of Appeals for the Seventh Circuit in a nine page opinion in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, Nos. 96-2839 and 96-2841, ___ F.3d ___ (7th Cir. July 2, 1997). A true copy of the court's slip opinion is attached.

5. *Newman* is the first federal appellate court (and the only appellate court other than this court) to expressly construe the federal legislation implicated herein on the exact issues involved in this appeal. (As

noted in *Newman* and the Bryans' briefs, the appellate affirmance in *Azar v. Hayter*, 66 F.3d 342 (11th Cir. 1995) was a PCA without opinion, on an appeal by a *pro se* litigant, and the reasons for affirmance are thus open to speculation.) Further, although *Newman* is a panel decision, the conclusions drawn in *Newman* and the two earlier seventh circuit cases upon which it relied (*Bass v. Stolper, Koritzinsky, Brewster & Neider, S.C.*, 111 F.3d 1322 (7th Cir. 1997) and *Ryan v. Wexler & Wexler*, 113 F.3d 91 (7th Cir. 1997)), and the fact that all three cases had different panels, render *Newman* as being almost the functional equivalent of an *en banc* decision. See *Newman* at 5, n.1.

Memorandum of Law

6. This court has jurisdiction to recall its mandate at any time during the current term of this court, i.e., from July 8, 1997 through January 12, 1998. See § 35.10, *Fla. Stat.* (1995). See also *State Farm Mutual Automobile Insurance Co. v. Judges of the District Court of Appeal, Fifth District*, 405 So.2d 980 (Fla. 1981) and *Judges of the Eleventh Judicial Circuit vs. Janovitz*, 635 So.2d 19 (Fla. 1994):

> An appellate court may recall a mandate before its term of court ends in order to revisit the cause.

635 So.2d at 20, *citing with approval, State Farm, supra.*

7. In *Theisen v. Old Republic Insurance Co.*, 468 So.2d 434 (Fla. 5th DCA 1985), this court held that a change in case law cannot result in the withdrawal of a prior opinion if the mandate thereon was issued in a prior term of court. The converse corollary, of course, is that the court

can, and should, withdraw its prior opinion where the case law does change during the same term as the mandate issues – which is the situation presented herein. And indeed, in *Brunner Enterprises, Inc. v. Department of Revenue*, 452 So.2d 550 (Fla. 1984), the Florida Supreme Court expressly acknowledged that an appellate court can and should reconsider the law of the case "in those situations where strict adherence to the rule would result in 'manifest injustice' ". 452 So.2d at 552-53. *Quoting with approval, Strazzulla v. Hendrick*, 177 So.2d 1 (Fla. 1965), *quoting from Beverly Peach Properties v. Nelson*, 68 So.2d 604 at 608 (Fla. 1953). *Brunner* continued by holding that:

> An intervening decision by a higher court is one of the exceptional situations in which a court will entertain a request to modify the law of the case.

452 So.2d at 553, *citing Strazzulla, supra.* Although the Seventh Circuit Court of Appeals may not be a "higher court", the Bryans submit that it is at least a court of equal dignity with this court and entitled to substantial persuasive weight – not only because it is a federal appellate court with experience in interpreting the particular federal law under scrutiny herein, but because it has a proven track record of accurately interpreting said law in a manner subsequently adopted by the United States Supreme Court. *Heintz v. Jenkins*, ___ U.S. ___, 115 S.Ct. 1489 (1995), *affirming* 25 F.3d 536 (7th Cir. 1994).

Conclusion

8. The Bryans' earlier foreshadowing of the result in *Newman* is no longer mere educated forecasting, but reality. This court has an opportunity to realign itself on its construction of this federal law with the same enlightened Seventh Circuit Court of Appeals that was affirmed by the Supreme Court in *Heintz* – and in doing so, to spare multitudes of homeowners and condominium owners from the abuses the FDCPA was enacted to prevent. It would be a manifest miscarriage of justice for this court's decision of May 9, 1997 to remain the law of the case where, as here, its underpinnings have been emasculated by three successive Seventh Circuit Court of Appeals decisions, the latest of which is on all fours with the case *sub judice*.

WHEREFORE, the Bryans move the court to stay or recall its mandate, as applicable, and revisit this cause in light of *Newman*.

Certificate of Service

I HEREBY CERTIFY that a true copy hereof has been furnished by U.S. Mail this 9th day of July, 1997 to Kenneth M. Clayton, Esq., Clayton & McCulloh, 1065 Maitland Center Commons Blvd., Maitland, FL 32751 and Randy Hillman, Esq., 203 Hillcrest Street, Orlando, FL 32803.

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IN THE STATE OF FLORIDA
FIFTH DISTRICT COURT OF APPEAL

5TH DCA CASE NO.: 96-2406
L.T. CASE NO.: CI95-5032

KEVIN E. BRYAN and RENEE M. BRYAN, his wife,

Appellants,

vs.

KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, A Florida General Partnership,

Appellees.

_____/

RESPONSE TO APPELLANTS' MOTION TO STAY OR RECALL MANDATE AND APPELLEES' MOTION FOR IMMEDIATE ISSUANCE OF MANDATE

COME NOW, the Appellees, KENNETH M. CLAYTON and NEAL McCULLOH, individually and d/b/a CLAYTON & McCULLOH, A Florida General Partnership, pursuant to Rule 9.300(a), Fla.R.App.Pr., and in response to Appellants' Motion to Stay or Recall Mandate and would state as follows:

ARGUMENT I

THE *NEWMAN* CASE IS ADVISORY, AT BEST, AND IS NOT CONTROLLING OF THE RESULT IN THIS CASE

1. It is well settled law in Florida that an appellate court must apply the law as it exists at the time the appeal is decided, even if there has been a change since the time of trial. *See e.g. Lowe vs. Price*, 437 So. 2d 142 (Fla. 1983); *Wheeler vs. State*, 344 So. 2d 244 (Fla. 1977).

2. An appellate "decision" encompasses the opinion and the judgment. *Seaboard ALR Co. v. Branham*, 104 So. 2d 356 (Fla. 1958); *See also Zirin vs. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

3. A "decision" is entered as of the date shown on the order or decision. Rule 9.340(a), Fla.R.App.Pr.

4. In the instant case, the opinion and judgment affirming the trial court was entered by this court on May 9, 1997. This decision was ratified and approved upon the denial of Appellants' Motion for Rehearing, which denial was dated June 25, 1997.

5. The case of *Newman vs. Boehm, Pearlstein & Bright, Ltd.*, Nos. 96-2839 and 96-2841, ___ F.3d ___ (7th Cir. July 2, 1997) was not decided until after the denial of the Appellants Motion for Rehearing. Therefore, this court properly applied the law in effect at the time the case was decided, to wit; June 25, 1997.

6. The *Newman* case is not controlling in the instant lawsuit.

7. As the Appellees have continuously argued, the federal case law on this subject is merely advisory to this

court. The federal case law is not, however, legally binding upon this court.

8. If one were to assume that the federal case law were in fact binding upon this court, then the case of *Azar v. Hayter*, 874 F. Supp. 1514, (N.D. Fla. 1995), *aff'd without op.*, 66 F.3d 342 (11th Cir. 1995), *cert. denied*, 116 S. Ct. 712 (1996), would be most binding in that it arose out of the Northern District of Florida, was appealed to our federal circuit (the 11th Circuit), and review was denied by the United States Supreme Court. *Newman* arises from a distant circuit (the 7th Circuit), and establishes nothing more than a conflict among the federal circuits. Furthermore, the decision in *Newman* is not final until after the time for rehearing elapses and/or an appeal is taken to the United States Supreme Court.

9. This conflict among the federal circuits may ultimately be resolved by the United States Supreme Court. Any decision by the United States Supreme Court would clearly be binding upon this court. However, unless and until the United States Supreme Court resolves this issue, a conflict among federal circuits is an insufficient basis upon which to deny issuance of the mandate or further delay the final resolution of the instant appeal.

10. To grant the relief requested by the Appellants is an extraordinary remedy. The cases cited by the Appellants all dealt with circumstances in which the change in the decisional law was in fact absolutely legally binding upon the lower tribunal. This is not the circumstance in the instant lawsuit.

ARGUMENT II

THE TERM OF COURT IN WHICH THE JUDGMENT WAS "RENDERED" HAS EXPIRED

11. An appellate "decision" encompasses the opinion and the judgment. *Seaboard ALR Co. vs. Branham*, 104 So. 2d 356 (Fla. 1958); *see also Zirin vs. Charles Pfizer & Co.*, 128 So. 2d 594 (Fla. 1961).

12. The issuance of the mandate is a routine ministerial function most often performed by the clerk of the court in which the decision is rendered. *See* Rule 9.340(a), Fla.R.App.Pr.; *See also Eldred vs. Reber*, 639 So. 2d 1086 (Fla. 5th DCA 1994).

13. Rule 9.340, Fla.R.App.Pr., ". . . . communicates clearly that rendition applies to an order of the court, not the issuance of the mandate." *Eldred*, 639 So. 2d 1086.

14. Pursuant to § 35.10, Fla. Stat., ". . . . the district courts of appeal shall hold two regular terms each year . . . commencing respectively on the second Tuesday in January and July." Section 35.10, Fla. Stat. (1995).

15. In their Motion to Stay or Recall Mandate, Appellants cite the case of *State Farm Mutual Automobile Insurance Co. vs. Judges of the District Court of Appeal, Fifth District*, 405 So. 2d 980 (Fla. 1981), for the proposition that ". . . . an appellate court may recall a mandate before its term of court ends in order to revisit the case."

16. It should be noted that, with respect to recalling the mandate of the appellate court, the *State Farm* case cites to and is based upon the Florida Supreme Court's holding in the case of *Chapman vs. St. Stephens Protestant Episcopal Church, Inc.*, 138 So. 630 (Fla. 1932).

17. In *Chapman*, the Florida Supreme Court stated:

> . . . . a majority of the court have reached the conclusion that the correct rule, which should be recognized and applied in such situation, is that the jurisdiction of this court, like the jurisdiction of courts generally, persists to the end of the term and then terminates, but that, *during the term at which a judgment of this court is rendered*, this court has jurisdiction and power which it may exercise, as the circumstances and justice of the case may require, to reconsider, revise, reform, or modify its own ***judgments*** for the purpose of making the same accord with law and justice, and that it has power to recall its own mandate for the purposes of enabling it to exercise such jurisdiction and power in a proper case. [emphasis supplied]

Chapman, 138 So. 2d at 632.

18. In line with *Chapman*, several other Florida cases have held that appellate courts have ". . . . the power [sic] recall its [sic] mandate *so long as* recall is within the term during which the ***opinion*** was issued." [emphasis supplied] *See, e.g. Owens vs. State*, 444 So. 2d 951 (Fla. 2nd DCA 1984); *See also United Faculty of Florida Local 1847 vs. Board of Regents, State University System*, 423 So. 2d 429 (Fla. 1st DCA 1982). Both of these cases cite to *State Farm* for the authority of a reviewing court to recall its mandate during the term in which the ***opinion*** was issued.

19. As held by this court in *Eldred*, ". . . . time begins to accrue when the appellate decision is "rendered" as

that term is defined in Florida Rule of Appellate Procedure 9.020(g)." *Eldred*, 639 So. 2d 1086.[1] "Rendition" occurs when the opinion is filed with the clerk of the court, not when the mandate is issued. *Eldred*, 639 So. 2d 1086.

20. In the instant action, the decision of this court was rendered, at the very latest, on June 25, 1997, the date that the Appellants' Motion for Rehearing was denied. Therefore, the decision was rendered during the January, 1997 term of court which term commenced on January 13, 1997, and ended on July 7, 1997.

21. The mandate was to be issued in the instant action on July 10, 1997, fifteen days after the denial of the Appellants' Motion for Rehearing. Therefore, the mandate was to be issued during the July, 1997 term of court which commenced on July 8, 1997.

22. All of the case law cited by the Appellant which permits the court to withdraw its mandate during the current term of court arise out of circumstances in which the rendition of the order and issuance of the mandate are in the ***same term of court***.

23. Appellees have been unable to locate any case law which addresses the particular and unusual circumstances of this case, to wit; when the order is rendered in

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[1] The issue presented in *Eldred*: when does a statute of limitations for litigational malpractice begin to accrue – the date the order is "rendered" or the date that the mandate is issued? While the instant case is not a "statute of limitations" case, as will be argued herein, the time delay between the rendition of the order and issuance of the mandate is equally critical in the instant action.

one term of court and the mandate is issued in the following term of court.

24. An appellate mandate is a notice from the appellate court to the trial court of the decision rendered in the cause. The mandate is a ministerial function of the clerk of the appellate court. *See* Rule 9.340, Fla.R.App.Pr.

25. As stated in the commentary to Rule 9.340, Fla.R.App.Pr., "The 15-day delay in issuance of mandate is necessary to allow a stay to remain in effect for purposes of rule 9.310(e)." The commentary to this rule also states that "The power of the court to expedite as well as delay issuance of the mandate, with or without motion, has been made express." Rule 9.340, Fla.R.App.Pr.

26. Rule 9.310(e) states "A stay entered by a lower tribunal shall remain in effect during the pendency of all review proceedings in Florida courts until a mandate issues, or unless otherwise modified or vacated." Rule 9.340(e) [sic], Fla.R.App.Pr.

27. Clearly, the procedural time delay between the rendition of the order and the ministerial function of the reviewing court issuing its mandate is to provide the lower tribunal with time to issue such necessary orders and/or make such necessary preparations for complying with the mandate of the reviewing court.

28. In the instant action, no stay was ever issued by the lower tribunal.

29. In the case of *Orange Federal Savings & Loan Association vs. Dykes*, 444 So. 2d 1152 (Fla. 5th DCA 1984), this court recognized that a brief time period between the issuance of the mandate and the close of a term of court

may result in a hardship, but nonetheless mandates denial of the motion for lack of subject matter jurisdiction.

30. In *Orange Federal*, the judgment was rendered on June 23, 1983 and the mandate was issued on July 11, 1983, both during the January, 1983 term of court. *Id.* at 1152. The July, 1983 term of court began on July 12, 1983. *Id.* at 1153.

31. In denying the belated motion for rehearing for lack of subject matter jurisdiction, this court, quoting with approval from *State Farm*, 405 So. 2d 980, stated "All things must have an end. This case has ended." *Orange Federal*, 444 So. 2d at 1153.

32. The term of court in which the "judgment" of this court was "rendered" ended on July 7, 1997. Therefore, the jurisdiction of this court to recall and/or reconsider that judgment ended on July 7, 1997. This conclusion should not be effected by the purely ministerial function of the issuance of this court's mandate, which mandate could have been issued immediately after the entry of the Order Denying Appellants' Motion for Rehearing on June 25, 1997. In the instant case, had the mandate been immediately issued after the denial of Appellants' Motion for Rehearing, Appellants' instant motion would be moot due to the fact that their motion was filed on July 9, 1997, after the end of the January, 1997 term of court.

WHEREFORE, For the reasons stated above, this case is at an end. Appellants' Motion to Stay or Recall Mandate should be denied, and the mandate of this court should be immediately issued.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Strike has been mailed to KENNETH L. MANN, ESQ., 39 West Pine Street, Orlando, Florida 32801, this 18th day of July, 1997.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON, et al.,

Respondents,

DISCRETIONARY PROCEEDING TO REVIEW DECISION OF 5TH DCA CASE NO. 96-2406

PETITIONERS' BRIEF ON JURISDICTION

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PREFACE

The plaintiffs/petitioners, Kevin E. Bryan and Renee M. Bryan, will generally be referred to in this brief as "the homeowners" or "the Bryans" or "the petitioners", or individually, as "Kevin" or "Renee". The defendants/respondents, Kenneth M. Clayton and Neal McCulloh, and their law firm partnership will generally be referred to individually as "Clayton" and "McCulloh", or collectively as "the law firm". Defendant/respondent Amber Ridge Homeowners' Association, Inc., will be referred to generally as "the homeowners' association". References to the Appendix are designated "(APX. ___)".

I. GROUNDS FOR INVOKING JURISDICTION.

Petitioners invoke the discretionary jurisdiction of this court pursuant to Florida Constitution Article V, Section 3(b)(3) and Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv), as construed by this court in *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988) and as elaborated upon below.

II. OPERATIVE JURISDICTIONAL FACTS.

The lower court decision, *Bryan v. Clayton*, 698 So.2d 1236 (Fla. 5th DCA September 12, 1997) (APX. 1-2, 4-7),

expressly interpreted key definitional provisions of a federal law (the federal Fair Debt Collection Practices Act, 15 U.S.C. Section 1692, *et seq.*, hereafter the "FDCPA" or "the Act") and virtually identical provisions in its Florida law counterpart (the Florida Consumer Collection Practices Act, Section 559.55, *et seq., Fla. Stat.* (1993), hereafter "the Florida Act") in a manner directly contrary to the federal Seventh Circuit Court of Appeals decision in *Newman v. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. July 2, 1997). *Bryan* declined to follow *Newman* even through *Newman* expressly reversed the latest of the five federal district court decisions relied upon in *Bryan*, namely, *Riter v. Moss & Bloomberg, Ltd.*, 932 F.Supp. 210 (N.D. Ill. 1996)[1], and even though, as discussed *infra*, Florida case law has long urged our state judiciary to look to the federal court's interpretation if a federal statute and a copycat state statute are involved and no public policy of Florida appears inconsistent with the federal case law.

Specifically, *Bryan* held, contrary to *Newman*, that the protections of the FDCPA and the Florida Act do *not* extend to homeowners and condominium owners who are subjected to abusive debt collection practices over allegedly delinquent dues and assessments. (APX 1-2, 4-7).

---

[1] *Newman* has since been followed (and the *Bryan* line of authorities further criticized) in a comprehensive opinion in *Thies v. Wyman*, 969 F.Supp. 604, 607 (S.D. Cal. 1997). Both cases are included in the Appendix herein for the court's convenience.

III. STATEMENT OF THE CASE.

The homeowners sued the law firm in Orange County Circuit Court. The law firm prevailed on summary final judgment and a timely appeal was taken. The district court of appeal affirmed with an opinion, as noted above (APX. 1), and thereafter denied clarification, rehearing, certification and rehearing *en banc* on June 25, 1997. (APX. 8). Before the mandate issued, however, the *Newman* decision was entered on July 2, 1997 (APX. 10), whereupon the homeowners timely moved to stay or recall the mandate by reason thereof. Ultimately, the motion was denied by opinion entered September 12, 1997. (APX. 1-2, 6-7). The mandate was thereafter issued on October 1, 1997 (APX. 3), and the homeowners timely filed their notice with the district court of appeal to invoke this court's discretionary jurisdiction on Monday, October 13, 1997.

IV. SUMMARY OF ARGUMENT.

Bryan presents decisional conflict under *Florida Star, supra,* because:

(1) *Bryan* fails to follow a well-reasoned federal appellate case on all fours (*Newman*) in interpreting a federal statute, the applicable provisions of which are replicated virtually verbatim in the Florida Act[2];

---

[2] *Compare* 15 U.S.C. Section 1692a(5) ("debt") *with* Section 559.55(1), *Fla. Stat.* (1993) (" 'debt' or 'consumer debt' "):

> [M]eans ***any*** obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services

(2) *Bryan* fails to articulate (and would be hard pressed to do so) how or why the federal case (*Newman*) is incompatible with Florida public policy; and

(3) Prior district courts of appeal and Florida Supreme Court opinions have been explicit that federal court opinions on federal law and Florida copycat law should be followed ***unless*** the court can demonstrate cogent public policy arguments not to do so. (Additionally, although the issue is unavoidably intertwined with the ultimate merits of the case, *Bryan* may also be said to present decisional conflict to the extent its express finding that the FDCPA and the Florida Act have no plain and clear meaning (contrary to the finding *in Newman, Thies* and the cases relied upon therein), may be viewed as a search for ambiguity, and, thus, the misapplication of this court's mandate to look to the ordinary meaning of words and their reasonable implications. *See, e.g., Savona v. Prudential Insurance Co.*, 648 So.2d 705, 707 (Fla. 1995), *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984), and *In re McCollam (LeCroy v. McCollam)*, 612 So.2d 572, 573 (Fla. 1993)). See also *State v. Egan*, 287 So.2d 1, 4 (Fla. 1973) (courts should use rules of statutory construction to remove doubt, not to create doubt).

> which are the subject of the transaction are primarily for personal, family or household purposes, whether or not such obligation has been reduced to judgment. [emphasis added]

Similarly, *compare* 15 U.S.C. Section 1692a(3) ('consumer') *with* Section 559.55(2), *Fla. Stat.* (1993) (" 'debtor' or 'consumer' "):

> [M]eans ***any*** natural person obligated or allegedly obligated to pay ***any*** debt. [emphasis added]

V. JURISDICTIONAL ARGUMENT.

Although the homeowners recognize that federal court decisions are not necessarily binding on state courts, Florida has a tradition for over 60 years that where (as here) the case involves the interpretation or construction of a federal statute, or (as also exists herein) the interpretation of a state statute which, in pertinent part, is virtually identical to a federal statute, then the state court should adhere to a ***reasoned*** federal case unless the federal case fails to comport with some fundamental contrary policy of Florida. See, e.g., *State v. Cook*, 108 Fla. 157, 146 So. 223 (1933) (look to federal court interpretation of similar federal statute where not "inharmonious with spirit and policy of state legislation"). *See also, State v. Jackson*, 650 So.2d 24 at 27 (Fla. 1995):

> A long-standing rule of statutory construction in Florida recognizes that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in the federal courts. *Gay v. Inter-County Tel. & Tel. Co.*, 60 So.2d 22 (Fla. 1952); *O'Loughlin v. Pinchback*, 579 So.2d 788, 791 (Fla. 1st DCA 1991) (statutory construction should be the same to the extent the construction is harmonious with the spirit of the Florida legislation).

Bryan neither stated, demonstrated, nor implied that the *Newman* analysis is in any manner inconsistent with the spirit and policy of Florida law. Moreover, the homeowners submit that the *Bryan* court would have been unable to do so, because if anything, the Florida legislative intent is even broader and more pro-consumer than the FDCPA. For example, the Florida Act provides:

> [I]n the event of any inconsistency between any provision of [the Florida Act] and any provision of [the FDCPA], the provision which is more protective of the consumer or debtor shall prevail.

Section 559.552, *Fla. Stat.* (1993).

Thus, while *Bryan* expressly conflicts with *Newman* (and *sub silentio* conflicts with *Thies*) on the merits, the conflict for jurisdictional purposes is not so much with *Newman* and *Thies*, but with *Cook, Jackson, Gay* and *O'Loughlin, supra*, all of which urged Florida courts to adopt well-reasoned federal case law where a federal statute is involved and where Florida public policy would not be offended and, *sub judice*, would be furthered by such an outcome. Indeed, just the type of conflict as presented herein may be what that this court envisioned in *Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988):

> This court in the broadest sense has subject-matter jurisdiction under Article V Section 3(b)(3) of the Florida Constitution, over *any* decision of a district court that expressly addresses ***a*** question of law within the four corners of the opinion itself. [emphasis added]

530 So.2d at 288. Similarly, this court continued:

> Thus, it is ***not*** necessary that conflict actually exist for this court to possess subject-matter jurisdiction, only that there be some statement or citation in the opinion that hypothetically ***could*** create conflict [with the decision of another district court of appeal or of the supreme court] ***if*** there were another opinion reaching a contrary result. [emphasis added]

> As the final authority on the meaning of the Florida Constitution[,] this Court has the final and inherent power to determine what constitutes express and direct conflict . . .
>
> This, by definition, is discretion, not jurisdiction.

530 So.2d at 288. Admittedly, the foregoing may be viewed as an arduous path to jurisdiction, as it requires that one take a panoramic rather than myopic view of the phrase "the same question of law" for purposes of Florida Rules of Appellate Procedure 9.030(a)(2)(A)(iv). However, the homeowners respectfully urge that *Florida Star* requires this result. And, *Florida Star* has been reaffirmed as recently as two weeks ago. *Beaty v. State*, 22 Fla. L. Weekly S626 (Fla. Oct. 9, 1997).

Accordingly, if this court disagrees with the homeowners' analysis and declines to accept discretionary review, the homeowners urge that the court concurrently consider the merits of prospectively receding from *Florida Star* in cases of state court/federal court conflict on federal questions, so that future, similarly-situated litigants can save funds, time and trees, and apply directly from the district court of appeal to the United States Supreme Court for certiorari, where the conflict jurisdiction is explicit. *See* United States Supreme Court Rule 10.1(b):

> When a state court of last resort has decided a federal question in a way that conflicts with the decision of . . . a United States Court of Appeals.

VI. STATEMENT OF IMPORTANCE OF REVIEW.

It should be self-evident that this decision has far-reaching implications beyond the immediate parties – ultimately, it has a direct or indirect bearing on every condominium owner in the State of Florida, as well as every homeowner who lives in a subdivision having a homeowners' association with assessment powers. In fact, even though the lower court declined to certify the issue to this court (APX. 8), it did specifically find in its May 12, 1997 order under Section 768.79, *Fla. Stat.* (1995), that:

> The question of law at issue was well presented on appeal and would be considered 'close'.
>
> The suite [sic] was in the nature of a test case presenting questions of far-reaching importance in Florida affecting non-parties who are charged with collecting condominium assessments or are obligated to pay them.

(APX. 9).

It is fundamental that the FDCPA and the Florida Act protect Florida citizens against debt collectors who improperly hound them for their failure to pay for retail purchases at, say, a shopping center. It is also clear that consumers protected under the FDCPA were intended by Congress to include not only those who buy personal property, but those whose debt is secured by real estate. *See, e.g.*, 15 U.S.C. Section 1692i(a)(1). Similarly, it is well-established that Florida endeavors to protect the sanctity of the home and the homestead. *See, e.g., Bessemer Properties, Inc. v. Gamble*, 158 Fla. 38, 27 So.2d 832 (1946); *Orange*

Brevard Plumbing & Heating Co. v. La Croix, 137 So.2d 201 (Fla. 1962); and *Graham v. Azar*, 204 So.2d 193 (Fla. 1967).

Yet, *Bryan* appears to be at odds with the foregoing public policies. A pundit might quip, with but only slight exaggeration, that unless jurisdiction is accepted in Tallahassee or Washington and the lower court is reversed, the decision in *Bryan* makes Florida residents safer in the malls than in their homes.

CONCLUSION

WHEREFORE, the homeowners urge this court enter an order accepting discretionary review of this cause.

Certificate of Service

I HEREBY CERTIFY that a true copies hereof and of the Appendix hereto have been furnished by U.S. Mail this 23rd day of October, 1997 to Kenneth M. Clayton, Esq., Clayton & McCulloh, 1065 Maitland Center Commons Blvd., Maitland, FL 32751 and Randy Hillman, Esq., 203 Hillcrest Street, Orlando, FL 32803.

Respectfully submitted,

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CASE NO.: 91,612

KEVIN E. BRYAN and RENEE M. BRYAN,

Petitioners,

vs.

KENNETH M. CLAYTON, et al,

Respondents.

DISCRETIONARY PROCEEDING TO REVIEW DECISION OF 5TH DCA CASE NO.: 96-2406

RESPONDENTS' BRIEF ON JURISDICTION

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PRELIMINARY STATEMENT

The Plaintiffs/Petitioners, Kevin E. Bryan and/or Renee M. Bryan, will collectively be referred to in this jurisdictional brief as the "Bryans" or the "Petitioners". The Defendants/Respondents, Kenneth M. Clayton and/or Neal McCulloh individually or doing business as Clayton & McCulloh, will be collectively referred to in this jurisdictional brief as "Clayton & McCulloh" or "the Respondents." The term "trial court" shall refer to the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida, the Honorable James C. Hauser presiding. The term "Appellate Court" shall refer to the Fifth District Court of Appeal located in Daytona Beach, Florida.

References to the Bryans' Brief on Jurisdiction, if any, shall be designated "Pet.Br. at ___". References to the

Bryans' Appendix to Petitioners' Brief on Jurisdiction shall be designated "Pet.Appx. at ___".

RESPONDENTS' STATEMENT OF THE CASE

Respondents concur with the Bryans' Statement of the Case (Pet.Br. at 2), with the following significant exception.

The Bryans' notice to invoke the discretionary jurisdiction of the Florida Supreme Court, which was filed with the Fifth District Court of Appeal on October 10, 1997, was *not timely* filed pursuant to law and the rules of appellate procedure.

SUMMARY OF ARGUMENT

The Bryans' Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court was not timely filed within 30 days of rendition of the order to be reviewed. The decision of the Fifth District Court of Appeal, entered on May 9, 1997, and from which the Bryans' sought to directly seek discretionary review, was "rendered" on June 25, 1997. The Bryans' Motion to Stay or Recall Mandate and Notice of Filing Supplemental Authority, filed with the Fifth District Court of Appeal on or about July 9, 1997, is not an authorized motion which tolled rendition of the decision.

The Appellate Court's order On Motion to Stay or Recall Mandate is a non-appealable interlocutory order by which the Appellate Court refuses to recall its previously rendered decision. Therefore, the Bryans' notice to invoke the discretionary jurisdiction of this court was not

timely filed within 30 days of rendition as required by the Florida Rules of Appellate Procedure.

Secondly, the decision rendered in the instant case by the Appellate Court does not expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law. The issue presented in this case is one of *first impression* before the appellate courts of the State of Florida. As such, it is impossible that the decision rendered by the Appellate Court expressly and directly conflicts with any prior Florida decisional law on the same question of law presented herein, to wit: homeowners' association and condominium association assessments are not a "debt" within the meaning of the Federal Fair Debt Collection Practices Act or the Florida Consumer Collection Practices Act.

Lastly, the Bryans' contention that there may be ". . . . far-reaching implications. . . . " or, in other words, that this is a matter of great public importance, is an insufficient and improper basis to confer jurisdiction in the supreme court. Only a district court of appeal may certify to the Florida Supreme Court a question of great public importance. In the instant matter, the Appellate Court refused to certify the question. As such, the supreme court lacks "great public importance" jurisdiction in the instant cause.

THE BRYANS' NOTICE TO INVOKE THE DISCRETIONARY JURISDICTION OF THE FLORIDA SUPREME COURT WAS NOT TIMELY FILED WITHIN 30 DAYS OF RENDITION OF THE DECISION IN THE INSTANT CAUSE.

Rule 9.020(h), Fla.R.App.Pr. (1997), defines when an order is rendered. This rule provides that an order is "rendered" when a signed copy of the order is filed with the clerk of court. *Id.* The rule also expressly provides for the limited types of motions which will toll rendition. *Id.* The commentary to Rule 9.020 states that "[t]o postpone rendition the motion must be timely, authorized, **and one of those listed**." *Id.* Pursuant to Rule 9.300(d)(2), Fla.R.App.Pr. (1997), motions which ***do not*** toll time are ". . . . motions for stay pending appeal, rule 9.310." Rule 9.310, Fla.R.App.Pr. (1997), governs stays of final orders pending review. The commentary to Rule 9.310 states that "[t]his rule interacts with rule 9.340, however, so that a party has 15 days between rendition of the court's decision and issuance of mandate. . . . to **move for a stay of mandate pending review**."

Rule 9.120, Fla.R.App.Pr. (1997), provides that in order to invoke the discretionary jurisdiction of the Florida Supreme Court, the notice must be filed with the district court of appeal within ". . . . 30 days of rendition of the order to be reviewed." The timely filing of a notice to invoke discretionary review in the supreme court is jurisdictional and the failure to timely file the notice precludes discretionary jurisdiction. *See, e.g. Roy vs. State*, 211 So. 2d 554 (Fla. 1968); *See also* Commentary to Rule 9.120, Fla.R.App.Pr. (1997).

In the instant case, the decision was filed in the Appellate Court on May 9, 1997. On May 27, 1997, the Bryans timely filed their Motion for Clarification, Rehearing, Rehearing En Banc, and Certification, and for Ancillary Relief. Pursuant to the rules of appellate procedure, the Bryans Motion for Rehearing, etc., clearly tolled the

time for filing a notice seeking to invoke the discretionary jurisdiction of the supreme court. On June 25, 1997, the Bryans Motion for Rehearing, etc., was denied by the Appellate Court. (Pet.Appx at 8). Therefore, pursuant to Rule 9.020(h), Fla.R.App.Pr. (1997), the May 9, 1997 decision was "rendered" on June 25, 1997. Therefore, the notice to invoke discretionary jurisdiction of the supreme court ***MUST*** have been filed within 30 days from and after June 25, 1997, to wit; on or before July 25, 1997.

On July 9, 1997, the Bryans filed with the Appellate Court their Motion to Stay or Recall Mandate, and Notice of Supplemental Authority. This motion is not an authorized motion which would either postpone rendition of the decision or toll the time for filing a notice seeking discretionary review. The filing of an authorized motion is required in order to toll the time for seeking discretionary review before the supreme court. *See Wagner vs. Bieley, Wagner & Associates, Inc.*, 263 So. 2d 1 (Fla. 1972) (motions directed to interlocutory orders cannot operate to toll the time for filing interlocutory appeal); *See also Lipsius vs. Bristol-Myers Company*, 269 So. 2d 680 (Fla. 1972) (petition to certify question as one of great public importance is not an authorized motion which delays rendition).

The commentary to Rule 9.120, Fla.R.App.Pr. (1997), clearly contemplates the filing of ***both*** a notice seeking discretionary review ***and*** a motion to stay pending review. The right to file both a notice and a motion to stay was expressly recognized by this court in *State vs. Roberts*, 661 So. 2d 821 (Fla. 1995).

The Bryans filed their Notice to Invoke Discretionary Jurisdiction with the Appellate Court on October 10, 1997, which date is 107 days after rendition of the Appellate Court's decision. The order On Motion to Stay or Recall Mandate is a non-appealable interlocutory type order which does not alter the rendition date of the Appellate Court's decision. As clearly stated in the order On Motion to Stay or Recall Mandate ". . . . we decline to recall our mandate and **reconsider our prior affirmance**." [emphasis supplied] (Pet.Appx. at 5) It is clear from the face of this order that the Appellate Court was neither issuing a new opinion nor amending or modifying its prior decision. As such, the decision entered by the Appellate Court on May 9, 1997, was rendered on June 25, 1997, i.e., the date the Bryans' Motion for Rehearing, etc. was denied. In the instant action, a notice to invoke the discretionary jurisdiction of this court ***must***, therefore, have been filed on or before July 25, 1997.

Furthermore, it would appear well settled law in Florida that an appellate court may, in the interest of justice, recall its mandate at any time during the term of court in which the mandate is issued. A holding by this court that a motion to recall or stay mandate (such as the motion filed herein by the Bryans) operates to toll the filing of a notice to invoke discretionary jurisdiction would have the absurd result of extending almost indefinitely the time for filing a notice to invoke the discretionary jurisdiction of the supreme court.[1]

---

[1] As required by § 35.10, Fla. Stat., the district courts of appeal have two six month terms each year. If a motion to stay or recall mandate is held by this court to be an "authorized

The Bryans' Notice to Invoke Discretionary Jurisdiction was untimely filed on October 10, 1997. The failure of the Bryans to timely seek discretionary review in the supreme court is jurisdictionally fatal.

THERE IS NO "EXPRESS AND DIRECT" CONFLICT OF THE DECISION RENDERED BY THE FIFTH DISTRICT COURT OF APPEAL IN THE INSTANT CAUSE AND THE DECISIONS OF ANY OTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW.

Article V, § 3(b)(3), Fla. Const., and Rule 9.030(a)(2)(A)(iv), Fla.R.App.Pr. (1997), provide that the supreme court **may** review decisions of district courts of appeal that ". . . . expressly and directly conflict with a decision of another district court of appeal or of the supreme court on the same question of law."

The supreme court's jurisdiction is a matter strictly proscribed by the state constitution. *E.g., Lawyers Title Insurance Corp., vs. Little River Bank & Trust Company,* 243 So. 2d 417 (Fla. 1970). The jurisdiction of the supreme court extends only to the narrow class of cases enumerated in Article V, Section 3(b) of the Florida Constitution. *E.g., Mystan Marine, Inc. vs. Harrington,* 339 So. 2d 200

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motion" tolling, or even more absurdly, **reviving** the time for filing a notice to invoke discretionary jurisdiction, then the time for filing such a notice is no longer 30 days after rendition of the decision, but instead could be months (or even years) between rendition of the decision, the filing of the motion to recall mandate, the resolution of that motion, and the filing of the notice to invoke discretionary jurisdiction.

(Fla. 1976). The conflict of the decisions must be express[2] and direct, i.e., it must appear within the four corners of the majority decision. *Reaves v. State*, 485 So. 2d 829 (Fla. 1986). Inherent or so called implied conflict may not serve as a basis for supreme court jurisdiction. *E.g., Dept. of Health and Rehabilitative Services vs. National Adoption Counseling Service, Inc.*, 498 So. 2d 888 (Fla. 1986). The conflict must be obvious and patently reflected in the decisions relied upon by the district court of appeal. *Trustees of the Internal Improvement Fund vs. O.H. Lobean*, 127 So. 2d 98 (Fla. 1961). A conflict must stem from divergent decisions on the same point of law by separate courts within the appellate jurisdictional system of the State of Florida. *Kyle vs. Kyle*, 139 So. 2d 885 (Fla. 1962). No conflict can arise if the points of law settled by the two cases are not the same. *Id.* at 887.

In the instant appeal, the decision in the case of *Newman vs. Boehm, Pearlstein & Bright, Ltd.*, 119 F.3d 477 (7th Cir. July 2, 1997) cannot constitute a conflict as that term has been defined by this court. The *Newman* case is not a case arising out of a court within the appellate jurisdictional system of the State of Florida.

The Bryans urge this court to accept jurisdiction based upon perceived and implied conflict between the decision in the instant case and the cases of *State v. Cook*, 108 Fla. 157, 146 So. 223 (Fla. 1933), *State v. Jackson*, 650 So. 2d 24 (Fla. 1995), *Gay v. Inter-County Tel. & Tel. Co.*, 60

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[2] In the case of *Jenkins vs. State*, 385 So. 2d 1356 (Fla. 1980), the court noted that "[t]he dictionary definitions of the term "express" include: "to represent in words"; "to give expression to." "Expressly" is defined: "in an express manner." *Id.* At 1359.

So. 2d 22 (Fla. 1952), and *O'Laughlin vs. Pinchback*, 579 So. 2d 788 (Fla. 1st DCA 1991). [hereinafter collectively referred to as the "Bryan Conflict Cases"].

As stated by the Bryans in their jurisdictional brief, all of the Bryan Conflict Cases stand for the proposition that it is a ". . . . long standing rule of statutory construction in Florida that if a state law is patterned after a federal law on the same subject, the Florida law will be accorded the same construction as given to the federal act in the federal courts." (Pet.Br. at 4). The single issue presented in the instant case is whether homeowners' association or condominium association assessments are a "debt" within the meaning of either the Federal Fair Debt Collection Practices Act or the Florida Consumer Collection Practices Act. Therefore, there is no "express and direct" conflict between the Bryan Conflict Cases and the instant lawsuit.

Furthermore, it is well settled law in Florida that appellate courts must apply the law as it exists at the time the appeal is decided. *See, e.g. Lowe vs. Price*, 437 So. 2d 142 (Fla. 1983). In the instant case, the decision of the Fifth District Court of Appeal was filed on May 9, 1997, and was rendered on June 25, 1997. The *Newman* case was decided on July 2, 1997. Therefore, *Newman* was decided ***AFTER*** rendition of the decision in the instant cause. The Appellate Court, therefore, properly applied the law *as it existed* on the date the instant decision was rendered. Therefore, there cannot even be an implied conflict between the instant decision and the Bryan Conflict Cases due to the fact that the Appellate Court properly applied the federal case law as it existed at the time the instant decision was rendered.

THE "IMPORTANCE OF REVIEW" AS ARGUED BY THE BRYANS IS NOT A PERMISSIBLE AND/OR SUFFICIENT BASIS TO VEST JURISDICTION IN THE SUPREME COURT OF FLORIDA.

The Bryans have argued that "[i]t should be self-evident that this decision has far-reaching implications beyond the immediate parties. . . . " (Pet.Br. at 6). The Bryans have also argued that ". . . . *Bryan* appears to be at odds with. . . . public policies." (Pet.Br. at 7).

Pursuant to Art. V, § 3(b)(4), Fla. Const., the Florida Supreme Court may ". . . . review any decision of a district court of appeal that passes upon a question **certified by it** to be of great public importance. . . . " Rule 9.030(a)(2)(A)(v), Fla.R.App.Pr. (1997), states that "[t]he discretionary jurisdiction of the supreme court may be sought to review decisions of district courts of appeal that pass upon a question certified to be of great public importance."

In *Lipsius vs. Bristol-Myers Company,* 269 So.2d 680 (Fla. 1972), this court specifically held that ". . . . certification must be upon motion of the Court and not by motion of a party to the cause." *Id.* at 681. *See also Allstate Insurance Co. vs. Langston,* 655 So. 2d 91 (Fla. 1995) (the Supreme Court does not have jurisdiction to review a decision of a district court of appeal based upon party's contention that the decision presents an issue of great public importance).

The Appellate Court refused to certify as a question of great public importance the issue presented in the

instant case. (Pet.Appx. at 6). Therefore, the Bryans' contention that there is an "importance of review" or that this matter presents, in effect, an issue of "great public importance" is wholly irrelevant and totally ineffective to confer jurisdiction upon this court.

CONCLUSION

For the reasons stated herein, the Bryans' notice to invoke discretionary jurisdiction of the supreme court is untimely or is otherwise ineffective to confer jurisdiction in the supreme court. Therefore, this court should summarily reject jurisdiction and dismiss the instant notice to invoke discretionary jurisdiction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondents' Brief on Jurisdiction has been mailed to KENNETH L. MANN, ESQ., Attorney for Petitioners, 105 E. Robinson Street, Suite 540, P.O. Box 551, Orlando, Florida 32802-0551, this 10th day of November, 1997.

/s/ James E. Olsen
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